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No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

ANTONE FOLKINS, et al.,
Respondents.

On Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A presidential executive order, issued several decades after California's admission to statehood, created an Indian reservation on lands appurtenant to a navigable river in California, but excluded the river itself from the reservation. The California Supreme Court held that the executive order, although preserving California's "title" to the river bed and its fish resources, "reserved" to the Indians the right to commercially fish in violation of California law.

The questions presented are:

1. Whether the reserved rights doctrine, which authorizes the United States to reserve unappropriated water for use on appurtenant reserved lands, should be expanded to allow Indian commercial fishing rights in a navigable river that the State of California holds in trust for all the people of California.

2. Whether a post-statehood executive order creating an Indian reservation on lands appurtenant to a navigable river, but excluding the river itself from the reservation in recognition of the State's sovereign title to the river and its fish resources, should nevertheless be construed as reserving Indian commercial fishing rights.

PARTIES

The petitioners are the People of the State of California, the real party in interest below. The respondents are Antone Folkins and Kenneth Mattz.

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OPINIONS BELOW

The decision of the California Supreme Court is reported at 46 Cal.3d 355 and 250 Cal.Rptr. 278, and is reprinted at Appendix 1. The decision of the California Court of Appeal is reported at 195 Cal.App.3d 431 and 240 Cal.Rptr. 723, and is reprinted at Appendix 31. The decision of the California Superior Court has not been officially reported, and is reprinted at Appendix 45.

JURISDICTION

The decision of the California Supreme Court was filed and entered on August 22, 1988. App. 1. A petition for rehearing was filed on September 6, 1988, and was denied on October 13, 1988. App. 47. The California Supreme Court decision is now final. This Court has jurisdiction to review the decision by writ of certiorari under 28 U.S.C. § 1257(3).

APPLICABLE FEDERAL LAWS

Presidential Executive Order, October 14, 1891:

> "It is hereby ordered that the limits of the Hoopa Valley Reservation in the State of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 18, 1864, (13 Stat., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the Hoopa Valley reservation to the Pacific Ocean; *Provided, however*, That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.
>
> BENJ. HARRISON."

1 Kappler, *Indian Affairs: Laws and Treaties* 815.

STATEMENT OF THE CASE

1. Background of the Controversy

This case presents a long-standing controversy concerning the State of California's jurisdiction to regulate Indian commercial fishing in the lower Klamath River, a navigable waterway that the State of California holds in trust for all its citizens. This portion of the river serves as a gateway for a valuable but fragile chinook salmon resource that predominantly spawns in upstream areas and migrates to the Pacific Ocean and back. To conserve the salmon resource, the California Legislature has prohibited all commercial fishing in the river since the mid-1930's. Cal. Fish & Game Code §§ 8434, 8685.6.

In 1891, long after California was admitted to statehood, President Benjamin Harrison issued an executive order creating an Indian reservation "to include a tract of country one mile in width on each side of the Klamath River," extending from the mouth of the river to another reservation located approximately 45 miles upstream. 1 Kappler, *Indian Affairs: Laws and Treaties*

815 (hereinafter "Kappler"). The executive order specifically excluded the river itself from the reservation in recognition of California's sovereign trust title to the river and its fish resource. See pages 19-22, *infra*.[1] [2]

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[1] In *Mattz v. Arnett*, 412 U.S. 481 (1973), this Court held that an 1892 congressional act opening up surplus reservation lands for entry and settlement did not terminate the reservation itself. On remand, the California Court of Appeal held that Public Law 280, 18 U.S.C. § 1162, 28 U.S.C. § 1360, which authorizes certain states to exercise limited civil and criminal jurisdiction over Indian reservations, does not grant authority to California to regulate Indian fishing in the Klamath River. *Arnett v. Five Gill Nets*, 48 Cal.App.3d 454, *cert. denied* 425 U.S. 907 (1975). Neither *Mattz* nor *Five Gill Nets* considered or decided whether the Indians possess "reserved" commercial fishing rights that constrain California's sovereign trust authority over the Klamath River fish resource, which is the issue raised in this petition.

[2] In 1977, the Secretary of the Interior adopted regulations prohibiting Indian commercial fishing in the Klamath River. 44 Fed. Reg. 9599 (Feb. 14, 1979), as amended and codified, 25 C.F.R. §§ 250.1-250.23. In *People v. McCovey*, 36 Cal.3d 517, 534-536, *cert. denied* 469 U.S. 1062 (1984), the California Supreme Court held that the Secretary's regulations preempt California law as applied to Indian commercial fishing. The Court, however, did not specifically consider whether the Indians possess "reserved" commercial fishing rights that constrain California's sovereign trust authority over the fish resource, or whether the 1891 executive order excluded the river itself from the reservation (notwithstanding that California raised these issues before the Court). Instead, the Court *assumed* that the Indians have commercial fishing rights under federal law, stating simply, and without analysis, that "the creation of a reservation for Indian purposes encompasses the right to fish on the reservation." 36 Cal.3d at 534 n. 22. Therefore, *McCovey's* holding that the Secretary's regulations have a preemptive effect is based on the Court's *assumed* premise that the Indians have commercial fishing rights under federal law. If, as this petition argues, the Indians do *not* have "reserved" commercial fishing rights under federal law, California law necessarily applies to Indian fishing and the Secretary would lack authority to adopt regulations that have a preemptive effect. Therefore, this petition, rather than seeking to adjudicate an issue decided in *McCovey*, challenges the assumed premise of that decision.

2. The Proceedings Below

In September 1981, the People brought a criminal action against the respondents,[3] charging them with violating and conspiring to violate California law by taking Klamath River salmon for commercial purposes by use of gill nets. Cal. Fish & Game Code §§ 8434, 8685.6; App. 1-2. The evidence at the preliminary hearing indicated that the respondents had sold thousands of pounds of gill-netted Klamath River salmon to an undercover federal agent—posing as a commercial fish dealer—in several transactions extending over several weeks. RT 28-80.

The magistrate granted the respondents' motion to dismiss, ruling that the river is included in the reservation and that the People cannot enforce their laws within reservation waters. App. 2. The People appealed to the Superior Court, arguing that (1) the State has the right to regulate Indian commercial fishing because the State has sovereign trust title to the fish resource under the equal footing doctrine, and also because the 1891 executive order excluded the river from the reservation in recognition of the State's sovereign trust title; (2) the State has the right to regulate Indian commercial fishing for conservation purposes under its police power; and (3) State law applies to Indians who sell fish off the reservation in any event. App. 2. The Superior Court upheld the People's off-reservation sales argument without reaching the People's sovereign trust title argument or police power argument, and reversed the magistrate's decision. App. 45-46.

The respondents filed an original petition for writ of prohibition in the California Court of Appeal, seeking to restrain further criminal proceedings against them. The parties asserted the same arguments as in the Superior Court proceeding. The Court of Appeal upheld the People's police power argument and affirmed the Superior Court decision; the police power is appropriate, the appellate court ruled, because the fish resource is predominantly produced in upstream waters and merely "passes through" the

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[3] One of the defendants, Diane Sue Mattz, whose name appears in the caption of the decision below, died during the pendancy of the appeal, App. 1 n. 1, and is not listed as a respondent in this petition.

reservation area in migrating to and from the ocean, and also because most of the fish resource is produced in upstream hatcheries operated by the State. App. 39-40, 42-43. The appellate court did not reach or consider the People's main arguments, which were that California has sovereign trust title over the fish resource and that the reservation excludes the river. App. 43 n. 4.[4] The respondents sought and obtained review in the California Supreme Court.

The California Supreme Court, in a divided opinion, reversed the decision of the Court of Appeal. App. 1. With respect to the People's main argument—that California has sovereign trust title over the resource, and that the reservation excludes the river—the Court acknowledged that, according to the executive order that created the reservation, California holds "title to the river bed of the Klamath River and its resources." App. 20. The Court held, however, that the executive order "reserve[d] Indian fishing rights" under the United States' general authority to "reserve water rights." App. 19-20. The Court stated that:

> "The People's fundamental assertion—that, after California's entry into the union, the federal government lost any right to reserve Indian fishing rights in the Klamath River through the establishment of an Indian reservation on federally owned land adjacent to the river—is quite similar to a claim which the United States Supreme Court expressly rejected 25 years ago in the case of Arizona v. California, supra, 373 U.S. 546. In that case, the State of Arizona challenged the right of the federal government to reserve water rights for Indians in the Colorado River through the creation of new Indian reservations in Arizona after Arizona had become a state. In rejecting the claim, the court explained: 'Arizona's contention that the Federal Government had no power, after Arizona became a State, to reserve waters for the use and benefit of federal reserved lands rests

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[4] The People's off-reservation sales argument had been rejected in the California Supreme Court's interim decision in *People v. McCovey, supra*, 36 Cal.3d at 534-536, and was not thereafter pursued in the case below.

> largely upon statements in Pollard's Lessee v. Hagan, . . . and Shively v. Bowlby. . . . Those cases and others that followed them gave rise to the doctrine that lands underlying navigable waters within territory acquired by the Government are held in trust for future States and that title to such lands is automatically vested in the States upon admission to the Union. *But those cases involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property.*' (373 U.S. at pp. 597-598 [emphasis added, fn. omitted]; see also United States v. New Mexico (1978) 438 U.S. 696, 698.) *Although the reserved rights in Arizona v. California involved the Indians' use of water for irrigation purposes, the People have cited no authority which suggests that Indian fishing rights, which may be equally central to Indian survival and self-sufficiency, are any less eligible for federal reservation and protection.*" App. 19-20 (first emphasis in original; second emphasis added; citations omitted).

Therefore, the Court held that, although California has sovereign trust "title" to the fish resource, the Indians possess "reserved" commercial fishing rights under federal law, and thus the State cannot regulate such rights.[5]

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[5] The California Supreme Court stated that it had previously ruled in *People v. McCovey, supra*, that the Indians "possess federally reserved fishing rights." App. 18. As noted above, however, *McCovey* simply *assumed* that the Indians have commercial fishing rights under federal law, and did not specifically consider whether the Indians possess "reserved" fishing rights that constrain California's sovereign trust authority. See note 2, *supra*.

The California Supreme Court rejected the People's police power argument by reaffirming its earlier holding in *McCovey* that the Secretary of the Interior's regulations preempt California law as applied to

ARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the question, never decided by this Court, whether Indians possess "reserved" commercial fishing rights in a navigable river that the state holds in trust for all the people. The California Supreme Court held that an executive order, issued long after California's admission to statehood, "reserved" Indian commercial fishing rights, in the sense that the United States "reserves" unappropriated for use on reserved lands. In effect, the Court held that the reserved rights doctrine authorizes reservations of fishing rights—contrary to this Court's decisions restricting the doctrine to water rights—and allowed the United States to "reserve" rights in navigable waters that could not be directly *granted* during the post-statehood period. Moreover, the Court misconstrued the executive order, which specifically excluded the river from the reservation in recognition of California's sovereign interests in the river. The decision below diminishes California's sovereign trust authority over a valuable but fragile fish resource that California has traditionally regulated for all the people.

Indian commercial fishing. App. 10-16. The Secretary's regulations, although relevant to the police power issue, are not relevant to the reserved rights issue raised here, because, as noted earlier, the Secretary would lack authority to preempt California law if the Indians do not possess "reserved" fishing rights that constrain California's sovereign trust authority over the fish resource. See note 2, *supra*. Indeed, the California Supreme Court appeared to recognize that the Secretary's regulations are irrelevant to the reserved rights issue, because the Court rejected the People's argument that it has sovereign trust authority over the fish resource only by holding that the Indians possess "reserved" fishing rights, and did not suggest that the Secretary's regulations could override California's sovereign trust authority. App. 19-20.

The California Supreme Court left open the possibility that the People may have police power authority to regulate Indian commercial fishing if the California Legislature enacts another statutory scheme more closely tailored to specific conservation exigencies in the Klamath River. App. 15 n. 7. Since the Court reserved full consideration of the police power issue until the Legislature enacts another statutory scheme, the issue is not raised in this petition.

Under the equal footing doctrine, each state, upon admission to statehood, acquires sovereign title and dominion over all navigable waters and fish resources therein, subject only to the paramount federal power to regulate commerce and navigation. *Pollard's Lessee v. Hagan*, 44 U.S. 212, 229 (1845); *McCready v. Virginia*, 94 U.S. 391, 394-395 (1876). The state holds the waters and resources in trust for all the people. *McCready*, 94 U.S. at 394-395. California thus has the sovereign right to regulate the Klamath River fish resource for the benefit of all its citizens.

In *Shively v. Bowlby*, 152 U.S. 1, 48 (1894), this Court held that the United States holds absolute title and dominion over navigable waters and fish resources during the *pre-statehood* period, and therefore has the right to grant proprietary rights in the waters and resources during that period. Following *Shively*, this Court has held that the United States has the right to grant Indian fishing rights by *treaties* executed *prior* to the state's admission to statehood. *United States v. Winans*, 198 U.S. 371 (1905). The corollary of *Shively* and *Winans* is that the United States cannot grant proprietary rights in navigable waters—including Indian commercial fishing rights—by executive orders issued *after* the state's admission. The Indian reservation in this case was created by an executive order issued after California's admission to statehood. Therefore, the executive order could not have granted Indian commercial fishing rights, even assuming that it meant to do so.

The California Supreme Court held that, although California has sovereign trust "title" over the river and its fish resources, the executive order "reserved" Indian commercial fishing rights, in the sense that the United States "reserved" water rights in *Arizona v. California*, 373 U.S. 546, 597-601 (1963). App. 19-20. In effect, the Court construed an executive order as *reserving* Indian commercial fishing rights during the post-statehood period, even though, under *Shively* and *Winans*, such rights could not have been directly *granted* during that period. The decision below allows the United States to indirectly accomplish under its reserved rights authority what cannot be directly accomplished under its authority to grant proprietary rights.

In applying the reserved rights doctrine here, the California Supreme Court expanded the doctrine far beyond limits recognized by this Court. According to this Court, the reserved rights doctrine holds that the United States impliedly "reserves" unappropriated water for use on federal reserved lands, with a priority based on the date of the reservation. *United States v. New Mexico*, 438 U.S. 696, 698, 702 (1978). As this Court stated in *New Mexico*, the United States reserves unappropriated "water" for "use" on reserved "lands." 438 U.S. at 698. Thus, the reserved rights doctrine is a water rights doctrine only. The doctrine authorizes reservations of *water rights* for use on land, but does not authorize reservations of commercial *fishing rights* in water. The California Supreme Court impermissibly converted a water rights doctrine into a doctrine authorizing reservations of other kinds of rights.

This Court has carefully restricted the scope of the reserved rights doctrine in order to minimize federal intrusion on state sovereign trust interests under the equal footing doctrine. In *New Mexico*, this Court held that the reserved rights doctrine authorizes the reservation of water only for "primary" reservation purposes, not "secondary" purposes. 438 U.S. at 696. Therefore, even assuming that the reserved rights doctrine should be extended to the fishing context, the question remains whether *commercial* fishing is a "primary" or "secondary" reservation purpose. The California Supreme Court utterly failed to make this inquiry. In our view, commercial fishing is not a "primary" reservation purpose because the Indians did not traditionally fish for commercial purposes during the pre-reservation period. This Court should grant review to determine whether commercial fishing is a "primary" reservation purpose, a question not answered by the Court below.

More generally, this Court has applied the reserved rights doctrine only where a qualitative analysis of federal, state and tribal interests supports its application. The California Supreme Court failed to qualitatively analyze these interests in expanding the doctrine here, but instead uncritically assumed that the presidential act of creating the reservation necessarily reserved commercial fishing rights. See notes 2, 5, *supra*. This Court should

grant review to provide the qualitative analysis of interests that is lacking in the decision below. We submit that a qualitative analysis does not support an expansion of the reserved rights doctrine to the commercial fishing context, particularly where, as here, California has regulated the fish resource for most of this century and the resource merely passes through the reservation area in migrating to and from the ocean.

The United States itself has agreed with California's position that the Indians in this case do not have "reserved" fishing rights under federal law. In 1940, the Solicitor of the U. S. Department of the Interior issued an opinion declaring that, since California was admitted to statehood *prior* to the creation of the Indian reservation in this case, California has the right to regulate Indian fishing in the Klamath River if the river was navigable at the time of California's admission. See pages 14-15, *infra*. The Solicitor's opinion is consistent with this Court's decisions in *Shively* and *Winans*, which hold that the United States cannot grant proprietary rights in navigable waters during the post-statehood period. Although administrative interpretations of statutes and regulations are entitled to "great weight," *e.g., Preiser v. Rodriguez*, 411 U.S. 475, 488-490 (1973), the California Supreme Court decision below accords the Solicitor's opinion no deference at all, and indeed does not even mention the opinion.

Additionally, the executive order creating the Indian reservation in this case supports California's position that the Indians do not have "reserved" fishing rights under federal law. The executive order, on its face, excluded the river from the reservation; the purpose of the exclusion, according to historical documents, was to preserve California's sovereign trust authority to regulate the fish resource for the benefit of all its citizens. See pages 19-22, *infra*. Thus, the executive order, rather than preempting California law by *reserving* commercial fishing rights, specifically recognized California's sovereign trust interests by *not* reserving such rights. The executive order is consistent with this Court's decisions in *Shively* and *Winans* and the Interior Solicitor's 1940 opinion, all of which make clear that the United States cannot convey proprietary rights in resources in navigable waters during the post-statehood period.

If, as the California Supreme Court held, the reserved rights doctrine applies to fish resources in navigable waters, the United States potentially would be able to reserve rights in other resources in navigable waters—such as mineral resources—that the states have traditionally held in trust for all their citizens. Thus, the decision below provides a doctrinal basis for an unprecedented expansion of federal control over resources other than the specific resource involved here. The decision has a potentially sweeping and devastating effect on state proprietary interests that transcends the immediate controversy.

In summary, the decision below allows Indians on a post-statehood executive order reservation to exercise exclusive commercial rights in a fish resource that California holds in trust for all its citizens. The decision reached this result by expanding the reserved rights doctrine—which this Court has always viewed as a water rights doctrine only—to the commercial fishing context. This Court should grant review to determine whether the reserved rights doctrine should be so expanded, and, if so, whether the executive order creating the reservation in this case can properly be construed as "reserving" such rights.

I

THE 1891 EXECUTIVE ORDER CREATING THE KLAMATH RIVER INDIAN RESERVATION COULD NOT AND DID NOT CONVEY INDIAN COMMERCIAL FISHING RIGHTS, AND THE CALIFORNIA SUPREME COURT IGNORED THIS COURT'S PRECEDENTS IN RULING OTHERWISE

Under the equal footing doctrine, each state acquires, upon admission into the Union, sovereign "dominion and property in navigable waters, and in the lands under them," to be held in trust "for the benefit and advantage of the whole community." *Martin v. Waddell*, 41 U.S. 367, 410 (1841); see *Pollard's Lessee v. Hagan, supra*, 44 U.S. at 229; *Shively v. Bowlby, supra*, 152 U.S. at 49-50; *United States v. Oregon*, 295 U.S. 1, 14 (1935). The states' sovereign interests include the right to regulate fish resources in navigable waters for the benefit of the whole commu-

nity. *McCready v. Virginia, supra*, 94 U.S. at 394-395; *Manchester v. Massachusetts*, 139 U.S. 240, 259-262 (1891); *Shively*, 152 U.S. at 11. As this Court stated in *McCready*:

> "The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. [Citations omitted.] *In like manner, the States own the tide-waters themselves, and the fish in them*, so long as they are capable of ownership while running. . . . The title thus held is subject to the paramount right of navigation, the regulation of which . . . has been granted to the United States. *There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State*, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish. . . . The right which the people of the State thus acquire . . . is, in fact, a property right, and not a mere privilege or immunity of citizenship." 94 U.S. at 395 (emphasis added).

Therefore, when California was admitted to statehood, it acquired sovereign interests in the Klamath River and its fish resource that are held in trust for the whole community.

This Court has held that the United States has the right to grant proprietary rights in navigable waters *prior* to the state's admission to statehood. *Shively*, 152 U.S. at 48; *United States v. Holt State Bank*, 270 U.S. 49, 54-55 (1926); *Montana v. United States*, 450 U.S. 544, 551-552 (1981); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). The United States, having "entire dominion and sovereignty" over the waters during the territorial period, has the right to convey proprietary rights during that period, although such rights are not unlimited. *Shively*, 152 at 48.[6] Following *Shively*, this Court has held that the United

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[6] This Court in *Shively* stated that:

> "By the Constitution, as is now well settled, the United States, *having rightfully acquired the Territories*, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and

States has the right to grant Indian fishing rights by a treaty executed prior to the state's admission to the Union. *United States v. Winans, supra*, 198 U.S. at 371. In *Winans*, this Court stated that:

> "It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the State upon its admission into the Union. . . . [¶] 'By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only Government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, *so long as they remain in territorial condition.*' " 198 U.S. at 382-383, quoting from *Shively*, 152 U.S. at 48 (emphasis added).

Thus, under *Winans*, the United States has the right to grant Indian fishing rights by treaties executed during the pre-statehood period, before the state acquires its sovereign interests in navigable waters. Indeed, this Court in other cases has upheld Indian fishing rights granted by pre-statehood treaties. *Department of Game v. Puyallup Tribe*, 391 U.S. 392 (1968); *Washington v. Washington State Commercial Ass'n*, 443 U.S. 658 (1979); *Metlakatla Indians v. Egan*, 369 U.S. 45 (1962). Although these decisions did not specifically cite or rely on *Winans*, they are consistent with *Winans*' holding that the United States has the right to grant Indian fishing rights by treaties during the pre-statehood period.

There are no treaties between the United States and California's Indian tribes. *Indians of California v. United States*, 98

> state, over all the Territories, *so long as they remain in territorial condition.* [Citations omitted.] [¶] We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States holds the Territory." 152 U.S. at 48 (emphasis added).

Ct.Cl. 583, 585 (1943). Moreover, the Indian reservation in this case was created by executive order *after* California's admission to statehood. California was admitted to statehood in 1850, 9 Stat. 452, and the executive order was issued in 1891, 1 Kappler 815. Therefore, California acquired its sovereign interests in the Klamath River fish resource prior to creation of the Indian reservation. Hence, under *Shively* and *Winans*, the executive order could not have granted Indian commercial fishing rights in derogation of California's sovereign trust authority, even assuming that it meant to do so.

The United States itself has adopted the same view. In 1940, the Solicitor of the U.S. Department of the Interior issued an opinion declaring that, since California was admitted to statehood prior to issuance of the 1891 executive order creating the Indian reservation in this case, California has the right to regulate Indian fishing in the Klamath River if the river was navigable at the time of California's admission. I Ops. Solicitor, U.S. Dept. of Interior, 1917-1974, at 945-948 (March 13, 1940). The Solicitor distinguished his earlier opinion declaring that the Indians of the Red Lake Indian Reservation in Minnesota are not subject to state fishing laws, stating that the Minnesota reservation was created *prior* to Minnesota's admission to statehood. *Id.* Referring to the Klamath River situation, the Solicitor declared that:

> "I find nothing in the history of the setting apart of the territory here in question to indicate that the Indians possessed any rights to the lands or water prior to the establishment of the reservations. . . . . [¶] Since the Indians in question derive any rights they may have in the river from the United States, the question to be considered is what title, if any, did the United States retain to itself in the bed of the particular portions of the river involved when the State of California was admitted into the Union. . . . [¶] Title to that portion of the bed of the Klamath River here in question passed to the State if the river at the points in question were navigable in 1850 . . . (see *United States v. Utah*, 283 U.S. 64, 75)." *Id.* at 945-946 (emphasis added).

Thus, under the Solicitor's opinion, California has the right to regulate Indian fishing if the Klamath River was navigable when

California was admitted to statehood in 1850.[7] The California Supreme Court decision is inconsistent with the Solicitor's opinion, and indeed does not even mention the opinion.

In summary, the United States could not and did not convey Indian commercial fishing rights in the Klamath River subsequent to California's admission to statehood in 1850, because California acquired sovereign interests in the fish resource that are held in trust for all the people of California.

II

THE CALIFORNIA SUPREME COURT IMPROPERLY EXPANDED THE RESERVED RIGHTS DOCTRINE TO THE COMMERCIAL FISHING CONTEXT

The California Supreme Court held that the executive order creating the Indian reservation "reserved" Indian commercial fishing rights, in the same sense that the United States "reserved" water rights in *Arizona v. California, supra*, 373 U.S. at 597-598. App. 19-22. Under the reserved rights doctrine, Congress impliedly reserves unappropriated water for use on appurtenant federal reserved lands, with a priority based on the date of the reservation. *United States v. New Mexico, supra*, 438 U.S. at 698-702; *Cappaert v. United States,* , 426 U.S. 128, 138-142 (1976); *Arizona v. California, supra*, 373 U.S. at 597-601; *Winters v. United States*, 207 U.S. 564, 577 (1908). In effect, the California Supreme Court decision allows the United States—by "reserving" commercial fishing rights—to effectively grant proprietary rights in fish resources *after* a state's admission to statehood,

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[7] The Klamath River is a navigable river under California law. Cal. Harbor & Nav. Code § 103; *People v. Ward Redwood Co.*, 225 Cal.App.2d 385, 387 (1964). Under federal law, the navigability of the Klamath River is evidenced by the fact that the federal public land surveyor meandered the river and approved federal township plats depicting the extent of public lands that did not include the river as public lands. See *e.g.*, Instructions to the Surveyors General of Public Lands (1855) (requiring U.S. Deputy Surveyors to meander navigable streams); *United States v. Utah*, 420 U.S. 304 (1975); *Harrison v. Fite*, 148 Fed. 781, 783 (8th Cir. 1906).

contrary to this Court's decisions in *Shively* and *Winans* and the Interior Solicitor's 1940 opinion, all of which preclude the United States from *granting* such rights during the post-statehood period. The decision below allows the United States to indirectly achieve under its reserved rights authority what cannot be directly achieved under its authority to grant rights. This Court should grant review to make clear that the United States cannot improperly "grant" rights during the post-statehood period by "reserving" them.

The California Supreme Court, in expanding the reserved rights doctrine to the commercial fishing context, disregarded this Court's decisions restricting the scope of the doctrine. This Court has consistently held that the doctrine authorizes reservations only of unappropriated *water* for *use* on reserved *lands*. As this Court stated in *New Mexico*:

> "This Court has previously concluded that whatever powers the States acquired over their waters as a result of congressional Acts and admission into the Union, . . . Congress did not intend thereby to relinquish its authority to reserve unappropriated *water* in the future for *use* on appurtenant *lands* withdrawn from the public domain for specific federal purposes." 438 U.S. at 698 (emphasis added).

Moreover, this Court has consistently applied the reserved rights doctrine only in a water rights context, and has never held or suggested that the doctrine applies in other contexts.[8] Therefore, the doctrine is a water rights doctrine only. The doctrine autho-

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[8] In *Winters*, 207 U.S. at 576-577, this Court held that the United States impliedly reserved unappropriated water for irrigation use on an Indian reservation in Montana. In *Arizona v. California*, 373 U.S. at 597-601, this Court held that the United States impliedly reserved unappropriated water for irrigation use on Indian reservations in Arizona and California, and that the reserved right was measured by the "practicably irrigable acreage" of the reservation. In *Cappaert*, 426 U.S. at 138-143, this Court held that the United States impliedly reserved unappropriated water for use on federal lands set aside as a national monument in Nevada, with a priority based on the date of the reservation. In *New Mexico*, 438 U.S. at 702, this Court held that the United

rizes reservations of water rights for use on land, but does not authorize reservations of commercial fishing rights in water. The California Supreme Court decision impermissibly expands the doctrine beyond its proper scope.

To support its expansion of the doctrine, the California Supreme Court cited this Court's decision in *Arizona v. California, supra*, 373 U.S. at 597-601, which held that the United States impliedly reserved water rights for irrigation uses on Indian reservations in Arizona and California. App. 20. Since *Arizona* involved a reservation of water rights, *Arizona* does not support an expansion of the doctrine to the commercial fishing context. In addition, the historic purpose of the reserved rights doctrine, as applied to Indian reservations, was to allow Indians to acquire water rights for development of their *land*. See *Arizona v. California*, 373 U.S. at 597-601; *Winters*, 207 U.S. at 576, 577; *Board of Commissioners v. Seber*, 318 U.S. 705, 715 (1943). This historic reservation policy is not consistent with reservations of commercial rights in fish resources that the states have always held in trust for the whole community.

III

THE CALIFORNIA SUPREME COURT FAILED TO DETERMINE WHETHER INDIAN COMMERCIAL FISHING IS A "PRIMARY" OR "SECONDARY" RESERVATION PURPOSE, OR OTHERWISE TO QUALITATIVELY ANALYZE FEDERAL, STATE AND TRIBAL INTERESTS

This Court has carefully restricted the scope of the reserved rights doctrine in order to minimize federal intrusion on the states' sovereign trust interests in navigable waters, and has applied the doctrine only where discrete federal interests have outweighed the states' sovereign trust interests. In *New Mexico*, this Court held that the reserved rights doctrine authorizes the reservation of water only for "primary" reservation uses, and that the United States must acquire water rights for "secondary"

States impliedly reserved unappropriated water for "primary" uses but not "secondary" uses on national forest lands in New Mexico.

reservation uses under state law. 438 U.S. at 696. Therefore, even as applied to water rights, the doctrine does not authorize the reservation of all water necessary to serve all needs of federal reserved lands. Rather, under *New Mexico*, the federal interest—in terms of whether "primary" or "secondary" reservation uses are involved—must be measured against the states' sovereign interests in regulating their water resources. The Court below, applying *Arizona v. California* by analogy but ignoring *New Mexico* altogether, failed to consider whether Indian *commercial* fishing is a "primary" or "secondary" reservation purpose. Therefore, even assuming that the reserved rights doctrine otherwise applies here, the decision below is inconsistent with this Court's analysis in *New Mexico*. This Court should grant review to determine whether commercial fishing is a "primary" reservation purpose, assuming that the reserved rights doctrine otherwise applies here. We submit that commercial fishing is not a "primary" reservation purpose because the Indians did not traditionally fish for commercial purposes during the pre-reservation period.

This Court has circumscribed the reserved rights doctrine in other respects in order to minimize federal intrusion on sovereign state trust interests. In *Cappaert v. United States, supra*, 426 U.S. at 141, this Court stated that the reserved rights doctrine authorizes the reservation only of the "amount of water" necessary to satisfy the "minimal need" of the reservation, "no more." This restriction, coupled with *New Mexico*'s distinction between "primary" and "secondary" reservation uses, reflects an accommodation of federal reserved rights authority and state equal footing authority. In light of this accommodation, it cannot be assumed that— simply because the United States reserves lands for Indian purposes—the United States necessarily reserves Indian commercial fishing rights. Rather, the tribal interest in fishing for commercial purposes must be measured against the states' interests in regulating their fish resources for the public. The decision below failed to qualitatively analyze these interests in extending the reserved rights doctrine to the commercial fishing context, and instead simply assumed that the presidential act of reserving land for Indian purposes necessarily reserved commercial fishing rights as well. See note 5, *supra*.

In our view, California's interest in conserving the Klamath River fish resource strongly outweighs any tribal interest in exploiting the resource for commercial gain. California has regulated the fish resource for most of this century. The resource is predominantly produced in waters upstream from the reservation area, and merely passes through the reservation area in migrating to and from the ocean. Therefore, the resource's contact with the reservation area is limited and episodic. Most of the fish resource is produced in upstream hatcheries operated by the State. These factors, we believe, weigh heavily against an expansion of the reserved rights doctrine to the commercial fishing context here. This Court should grant review to determinate whether a qualitative analysis of competing interests supports an expansion of the reserved rights doctrine to the commercial fishing context. We submit that it does not.

IV

THE PRESIDENTIAL EXECUTIVE ORDER CREATING THE INDIAN RESERVATION SPECIFICALLY EXCLUDED THE RIVER FROM THE RESERVATION IN RECOGNITION OF CALIFORNIA'S SOVEREIGN INTERESTS IN THE RIVER AND ITS FISH RESOURCE, AND THEREFORE DID NOT RESERVE INDIAN COMMERCIAL FISHING RIGHTS

The 1891 executive order creating the Indian reservation in this case provided that the reservation included only a "*tract of country* one mile in width *on each side* of the Klamath River . . ." 1 Kappler 815 (emphasis added). Thus, the executive order provided on its face that the reservation includes only the *lands* appurtenant to the river, but not the *river* itself.

The surrounding historical circumstances reveal that the executive order excluded the river from the reservation in recognition of California's sovereign interests in the river and its fish resource. In 1891, the Secretary of the Interior proposed to extend an upstream Indian reservation to the mouth of the Klamath River in order to provide a homeland for the Yurok Tribe. The Secretary asked the U. S. Attorney General for an opinion concerning the

legality of the extension. In reply, the U. S. Attorney General issued an opinion in 1891 declaring that, although the upstream reservation could be lawfully extended, the extension could not include the river itself because California acquired a sovereign interest in the river and its fish resource upon its admission to statehood in 1850. Letter from Assistant U. S. Attorney General to Secretary of the Interior, January 20, 1891 (hereinafter "1891 Att. Gen. Op.").

The Attorney General's 1891 opinion cited an earlier 1887 Attorney General opinion on the same question, which had stated that:

> "The Klamath River being a navigable stream the public have the right to fish there and use it in any way that does not amount to an interruption or interference with interstate or foreign commerce or navigation, or a violation of some law of the State of California. [¶] In the case of McCready v. Virginia (94 U.S., 391, 394) the Supreme Court says: . . . '*In like manner the States own the tide-waters themselves and the fish in them, so far as they are capable of ownership while running.* For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. (Martin v. Waddell, 16 Pet., 410) The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. *There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tidewaters and their beds, to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation.*" S. Exec. Doc. No. 140, at 13-14, 50th Cong., 2d Sess. (1887), cited in 1891 Atty. Gen. Op. 25 (emphasis added).

The Attorney General's 1891 opinion concluded that:

> "Inasmuch as the Klamath River is not within the Indian country nor the Indian reservation of 'one mile in width on each side' thereof, there was and could be no question . . . as

> to the legal or actual status of that reservation." 1891 Atty. Gen. Op. 26.[9]

Thus, the Attorney General opinion declared that the proposed extension could not include the river because California acquired sovereign title to the river and its fish resource upon admission into the Union. The Attorney General opinion is consistent with this Court's decisions in *Shively* and *Winans* and the Interior Solicitor's 1940 opinion, all of which make clear that the United States cannot grant or reserve Indian fishing rights during the post-statehood period.

The Secretary of the Interior transmitted both the proposed executive order and the Attorney General's 1891 opinion to the President, explaining that the Attorney General opinion explained the "reason for the issuance of the order in the premises." Letter from Secretary of the Interior to President Benjamin Harrison, Oct. 12, 1981. The President signed the executive order as proposed. The executive order provided—consistently with the recommendation in the Attorney General opinion—that the reservation includes only a "tract of country one mile in width on each side of" the Klamath River. 1 Kappler 815. Since the President relied on the Attorney General opinion in signing the executive order, and since the executive order contained the language recommended in the Attorney General opinion, the Attorney General opinion is highly relevant in construing the executive order itself.

In short, the executive order, both on its face and in light of surrounding historical circumstances, excludes the river from the reservation in recognition of California's sovereign right to regulate the fish resource for the benefit of the whole community. The executive order, rather than "reserving" Indian fishing rights, specifically recognized California's sovereign right to regulate the

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[9] In the proceedings below, the Superior Court, at the People's request, granted judicial notice of the U.S. Attorney General's 1887 and 1891 opinions. App. 45. Although the People requested the California Supreme Court to grant judicial notice of these opinions, the Supreme Court did not specifically grant judicial notice, App. 18, but nonetheless considered the opinions on their merits. App. 20-21.

resource for the public. The California Supreme Court below misconstrued the purpose and effect of the executive order. As this Court commented in another Indian law case, the judicial "task [in construing federal Indian laws] . . . is a narrow one," for the judiciary "cannot remake history." *DeCoteau v. District County Court*, 420 U.S. 425, 449 (1975).

The California Supreme Court acknowledged that the historical circumstances indicate that California, "upon entry into the union, acquired *title* to the river bed of the Klamath River and its *resources*." App. 20 (emphasis added). The Court stated, however, that these historical circumstances do not indicate that the 1891 executive order did not mean to "reserve" Indian commercial fishing rights, particularly because the Indians had traditionally fished in the area. *Id.* The Court's analysis appears contradictory. If, as the Court acknowledged, the executive order recognized California's "title" to the fish "resources," the executive order manifestly did not authorize Indians to commercially harvest the resource in violation of California law. It is contradictory to hold that California has "title" to the resource but cannot prohibit its commercial exploitation.[10]

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[10] The California Supreme Court also stated that its decision was supported by *Donnelly v. United States*, 228 U.S. 213 (1913). App. 21, & n. 9. In *Donnelly*, this Court upheld the jurisdiction of a federal court over a criminal prosecution involving a murder that had occurred within the bed of the Klamath River. This Court reasoned that the murder was committed within an Indian reservation because the United States had "title" to the river bed.

On rehearing, however, this Court specifically withdrew that portion of the opinion holding that the United States had "title" to the river bed, which was the premise for the Court's conclusion that the river bed was included within the reservation. 228 U.S. at 708. Therefore, contrary to the California Supreme Court's view, this Court has never held that the reservation includes the river bed. Moreover, if the California Supreme Court meant to cite *Donnelly* for the view that the United States has title to the river bed, the instant decision is internally inconsistent, for the decision also holds that the historical circumstances indicate that California has "title to the river bed of the Klamath River and its resources." App. 20.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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Appendix A

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

S002805
(Ct. of Appeal A024108)

Diane Sue Mattz et al.,
Petitioners,

v.

The Superior Court of Del Norte County,
Respondent;

The People,
Real Party in Interest.

[Filed Aug. 22, 1988]

In 1981, the People filed criminal charges against Diane Sue Mattz, Antone Folkins and Kenneth Mattz (hereafter defendants)—three Yurok Indians of the Hoopa Valley Indian Reservation in Northern California—arising out of defendants' alleged commercial fishing activities in the Klamath River on the reservation.[1] Before trial, defendants challenged the state's authority to pursue the prosecutions, and in 1984, while this writ proceeding was pending inthe Court of Appeal, we held in People v. McCovey (1984) 36 Cal.3d 517 that the comprehensive federal regulation of Indian fishing rights on the Hoopa Valley Indian Reservation preempts the state from criminally prosecuting Yurok Indians for such activity. Although acknowledging the similarity between the present proceeding and *McCovey,* the Court of Appeal found that *McCovey* was not controlling for a number of reasons and held that the underlying criminal prosecutions could go forward. We granted review to consider the validity

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[1] Diane Sue Mattz died during the pendency of this proceeding. Because the title of the proceeding below bears her name, we have retained the title for consistency. (See Cal. Style Manual (3d ed. 1986) § 211, p. 145.)

(SEE CONCURRING AND DISSENTING OPINIONS)

of the Court of Appeal's interpretation and application of *McCovey* and now reverse the Court of Appeal judgment.

I

In September 1981, defendants were charged with violating and conspiring to violate criminal provisions of the California Fish and Game Code which prohibit (1) the sale of fish taken in the Klamath River District, and (2) the sale, or possession for sale, of any salmon, steelhead or striped bass, taken in California waters by means of a gill net. (Fish & G. Code, §§ 8434, 8685.6; Pen. Code, § 182.) The evidence presented at the preliminary hearing established that defendants are Yurok Indians of the Hoopa Valley Indian Reservation and that the charged offenses involved fish caught within the boundaries of the reservation. On the basis of that evidence, the magistrate dismissed the charges, concluding that the state lacked jurisdiction to prosecute defendants for such fishing activities in reservation waters.

The People then moved in superior court to reinstate the charges. The superior court, relying in large part on the fact that the federal regulations in effect at the time of the alleged offenses barred commercial fishing by Indians in the Klamath River, found that state prosecutions for such conduct were not preempted and reinstated the charges. Defendants' subsequent motion to dismiss was denied by the superior court in August 1983.

In September 1983, defendants filed the present writ proceeding in the Court of Appeal, maintaining, inter alia, that California lacks jurisdiction to prosecute Indians of the Hoopa Valley Reservation under state law for offenses arising from on-reservation fishing. As noted, at the time the writ petition was filed, a case presenting a similar legal issue—People v. McCovey, *supra,* 36 Cal.3d 517—was pending before our court. Recognizing that the decision in *McCovey* might well be dispositive of this mater, defendants, at the People's request, waived their rights to a speedy trial "to a date ninety (90) days after the filing of the remittitur" in *McCovey,* and the Court of Appeal held this matter in abeyance pending our *McCovey* decision.

We handed down our decision in *McCovey* in July 1984, concluding generally that the comprehensive federal regulation of Indian fishing rights on the Hoopa Valley Reservation preempted state criminal prosecutions both of Indian fishing activities on the reservation and of the off-reservation sale by reservation Indians of fish that had been caught on the reservation. The People sought certiorari in the United States Supreme Court, but that court denied the petition for certiorari in November 1984. (California v. McCovey (1984) 469 U.S. 1062.)

A few weeks thereafter, the People filed an opposition brief in the present writ proceeding in the Court of Appeal, contending that the *McCovey* decision was not dispositive of this proceeding and arguing—on the basis of historical documents of which it urged the court to take judicial notice—that the Yurok Indians possess no federally protected fishing rights in the Klamath River and that the federal government lacked the constitutional authority to adopt the regulations which *McCovey* had found preempted state criminal prosecutions. Ten months later, in October 1985, after the People had filed several additional letter briefs, defendants filed a notice of abandonment of the writ proceeding in the Court of Appeal. The Court of Appeal initially summarily dismissed the proceeding pursuant to the abandonment, but when the People informed the appellate court that it had not received notice of the proposed abandonment and urged the court to vacate the dismissal, the Court of Appeal vacated the dismissal order and reinstated the proceeding.

In October 1987, the Court of Appeal rendered its decision in this matter. Although the Court of Appeal recognized that the *McCovey* decision "would at first blush appear to entitle [defendants] to a writ of prohibition restraining further prosecution on the state criminal charges," the court went on to conclude that *McCovey* did not require it to issue such a writ. The Court of Appeal did not, however, embrace the People's assertion that the federal government lacked the constitutional authority to promulgate regulations governing Indian fishing rights on the Hoopa Valley Reservation, but instead held that the state's interest in conservation justifies concurrent state and federal regulatory jurisdiction over commercial Klamath River fishing and that *McCovey*

did not preclude the state from exercising such jurisdiction even with respect to on-reservation fishing activities by Yurok Indians. Accordingly, it denied the writ petition, permitting the underlying criminal prosecutions against defendants to go forward.

We granted review to determine the validity of the Court of Appeal's interpretation and application of *McCovey*.

II

As a threshold matter, defendants contend that the Court of Appeal lacked jurisdiction to render its decision on the merits of this writ proceeding. On October 7, 1985, after the matter had been fully briefed in the Court of Appeal, defendants, who had instituted this writ proceeding, filed a "notice of abandonment" of the writ petition with the Court of Appeal (see Cal. Rules of Court, rules 19, 38, 53), requesting that the court "order the dismissal of the writ and the issuance of their remittitur." Defendants evidently did not serve the People with a copy of the notice of abandonment and the clerk of the court also apparently failed to immediately notify the People of the filing of the notice. (See Cal. Rules of Court, rules 19(c), 38.) On October 15, 1985, the Court of Appeal, having received no opposition from the People, summarily dismissed the petition pursuant to the abandonment.

The People received notice of the dismissal on October 16, 1985, and immediately filed a motion requesting the Court of Appeal to vacate its order of dismissal. In their motion, the People pointed out that they had not received notice of the proposed abandonment, and urged the court to vacate the dismissal and retain the case in light of the important public question presented by the proceeding. (See, e.g., Lucchesi v. City of San Jose (1980) 104 Cal.App.3d 323, 326 fn. 2.)[2] On October 25,

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[2] In urging the Court of Appeal to retain the case, the People argued that the federal government's ability to effectively regulate Indian fishing had been seriously impaired by the then-recent federal district court decision in United States v. Wilson (N.D. Cal. 1985) 611 F.Supp. 813, in which the court had invalidated a federal regulation prohibiting all on-reservation commercial fishing by Yurok Indians on the ground that the federal agency which had promulgated the regulation had not

1985, the Court of Appeal issued an order vacating its initial dismissal order and reinstating the writ proceeding. Defendants did not challenge the validity of the order vacating dismissal at that point, and the Court of Appeal went on to decide the writ petition on the merits.

Defendants now contend that the Court of Appeal lacked jurisdiction to decide the matter. Although defendants acknowledge that under rules 19(b) and 38 of the California Rules of Court the Court of Appeal had discretion to decline to accede to their proposed abandonment of the writ proceeding (see generally 9 Witkin, Cal.Procedure (3d ed. 1985) Appeal, § 505, p. 491; Cal. Civil Appellate Practice (Cont.Ed.Bar 1985) § 10.15, pp. 287-288), they contend that once the Court of Appeal ordered dismissal it lacked jurisdiction to reinstate the proceeding. Past cases have held, however, that under appropriate circumstances a Court of Appeal may vacate an order of dismissal and reinstate an appeal (see, e.g., Lundy v. Lakin (1949) 89 Cal.App.2d 849; Krug v. Meehan (1951) 108 Cal.App.2d 416; see generally 9 Witkin, Cal.Procedure (3d ed. 1985) Appeal, § 514, pp. 497-498), and at least under the circumstances of this case—in which the Court of Appeal, in ordering dismissal, was apparently unaware that the clerk of the court had failed to immediately notify the People of the proposed abandonment as required by rules 19(c) and 38—we conclude that the Court of Appeal had similar authority to vacate its dismissal of the writ proceeding. Indeed, in view of the fact that defendants voiced no objection to the Court of Appeal's reinstatement of the proceeding at a time when the People could still have sought review of the initial dismissal in this court, it clearly would be inequitable to permit defendants to challenge the Court of Appeal's decision on such a basis at this late date.

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demonstrated a sufficient justification to warrant that degree of interfernce with Indian fishing rights.

In United States v. Eberhardt (9th Cir. 1986) 789 F.2d 1354, the Ninth Circuit reversed the *Wilson* decision, holding that the district court had applied an improperly restrictive legal standard in concluding that the Interior Department had exceeded its statutory authority in issuing the fishing regulations for the Hoopa Valley Indian Reservation.

Accordingly, we turn to the merits of the Court of Appeal decision.

III

The principal issue is whether the Court of Appeal properly declined to follow this court's recent decision in *McCovey*. Some background on the geography and history of the Hoopa Valley Indian Reservation may be a helpful preface to a summary of the *McCovey* decision.

A.

As explained in *McCovey*, the present Hoopa Valley Indian Reservation is, geographically, made up of three contiguous sections: "(1) the Old Klamath River Reservation, a 2-mile wide strip of land, 1 mile in width on each side of the Klamath River, which extends 20 miles inland from the mouth of the river on the Pacific Ocean; (2) the original Hoopa Valley Reservation, a 12-mile square area, containing approximately 89,000 acres, which lies on both sides of the Trinity River; and (3) a 30-mile strip along the Klamath River which connects (1) and (2)." *McCovey*, supra, 36 Cal.3d at pp. 523-524.) (A map of the reservation is set forth as an appendix to *McCovey*, supra, 36 Cal.3d at p. 538.)

The history of the Hoopa Valley Indian Reservaton has been recounted in detail in two United States Supreme Court, and numerous lower court, decisions over the past seventy-five years and there is no need to extensively review that history here. (See, e.g., Donnelly v. United States (1913) 228 U.S. 243; Mattz v. Arnett (1973) 412 U.S. 481; United States v. Eberhardt (9th Cir. 1986) 789 F.2d 1354; Blake v. Arnett (9th Cir. 1981) 663 F.2d 906; Elser v. Gill Net Number One (1966) 246 Cal.App.2d 30; Arnett v. Five Gill Nets (1975) 48 Cal.App.3d 454; Donahue v. Justice Court (1971) 15 Cal.App.3d 357.) For our purposes, a brief summary should suffice.

In 1853, Congress enacted legislation authorizing the President "to make . . . reservations . . . in the State of California . . . for Indian purposes." (10 Stat. 238 (Mar. 3, 1853).) Two years later, the President established the Klamath River Reservation by

executive order. (See Mattz v. Arnett, supra, 412 U.S. 481, 487.) In 1864, Congress passed legislation authorizing the President to set apart no more than four tracts of land in California "for the purposes of Indian Reservations," and in 1876, the Hoopa Valley Indian Reservation—a reservaton geographically separate from the Klamath River Reservation—was formally set aside for Indian purposes pursuant to the 1864 act. (*Id.* at pp. 493-494.)

In 1891, the original Hoopa Valley Indian Reservation "was entended [by executive order] so as to include all land, one mile in width on each side of the [Klamath] [R]iver, from 'the present limits' of the [original] Hoopa Valley Reservation to the Pacific Ocean. The Klamath River Reservation, or what had been the reservation, thus was made part of the Hoopa Valley Reservation, as extended." (Mattz v. Arnett, supra, 412 U.S. 481, 493.)

In 1913, the question of the validity of the 1891 extension of the Hoopa Valley Reservation came before the United States Supreme Court in Donnelly v. United States, supra, 228 U.S. 243. In that case, the defendant had been tried and convicted in federal court for killing a member of the Yurok (or, as it was also known, Klamath) Indian tribe "while he was in or near the edge of the water of the Klamath River, at a place within the exterior limits of the Extension" (228 U.S. at p. 252), and the defendant contended, inter alia, that the federal government had no jurisdiction over the case because the executive order extending the Hoopa Valley Reservation to include the area of the Klamath River Rreservation was invalid and thus the crime had not been committed within the boundaries of a federal Indian reservation. The *Donnelly* court rejected the contention and affirmed the conviction.

Despite the *Donnelly* decision, supra, 228 U.S. 243, over the ensuing decades questions continued to be raised as to whether the Hoopa Valley Reservation Extension—the old Klamath River Reservation—remained in existence or whether that portion of the reservation had been terminated by an 1892 federal act permitting allotment of unoccupied land in that area to non-Indian settlers. (See, e.g., Elser v. Gill Net Number One (1966) 246 Cal.App.2d 30, 34.) In Mattz v. Arnett, supra, 412 U.S. 481, that question arose in the context of an action brought by the

California Department of Fish and Game, seeking a court order authorizing the sale or destruction of five gill nets—belonging to Raymond Mattz, a Yurok Indian—which had been seized by a California game warden. In the initial state court proceeding, the California courts concluded that in light of the 1892 federal act the Klamath River Reservation was not Indian territory and that the gill nets were therefore subject to seizure pursuant to state law. (Arnett v. Five Gill Nets (1971) 20 Cal.App.3d 729.) The United States Supreme Court granted certiorari and reversed, concluding "that the Klamath Indian Reservation was not terminated by the [1892 legislation] and that the land within the boundaries of the reservation is still Indian country. . . ." (Mattz v. Arnett, supra, 412 U.S. at p. 506.)

In the proceedings on remand of the *Mattz v. Arnett* decision, the trial court held that, in view of the United States Supreme Court's conclusion as to the status of the Hoopa Valley Reservation Extension, the state had no authority to regulate subsistence fishing by Indians on the Klamath River Reservation because federal law exempted Indian fishing rights on reservations from state regulation. The state appealed that ruling, but in Arnett v. Five Gill Nets (1975) 48 Cal.App.3d 454 [hereafter *Five Gill Nets*], the Court of Appeal affirmed the trial court's decision, rejecting the states arguments (1) that federal law did not protect the Indians' traditional on-reservation fishing rights from state regulation, and (2) that the state's interest in conservation of salmon was sufficient to justify the regulation at issue in that case. The United States Supreme Court denied the state's petition for certiorari. (Arnett v. Five Gill Nets (1976) 425 U.S. 907)

In 1977, two years after the *Five Gill Nets* decision, supra, 48 Cal.App.3d 454, had established that Indians exercising traditional fishing rights in the Klamath River were exempt from state regulation, the United States Department of the Interior—the federal agency charged with the duty of overseeing Indian affairs —promulgated extensive regulations governing Klamath River fishing by Indians of the Hoopa Valley Reservation. (42 Fed.Reg.

40904-40905 (Aug. 12, 1977).)[3] The purpose of the regulations, as set forth in the regulations themselves, "is to protect the fishery resources and to establish procedures for the exercise of the fishing rights of Indians of the Reservation until a Reservation-wide management mechanism is established with the capability to manage and regulate the Indian fisheries on the Reservation. The regulations are intended to promote reasonably equal access to the fishery resources of the Reservation by all Indians of the Reservation, and to assure adequate spawning escapement." (25 C.F.R. § 250.1(a) (1988).)

As we noted in *McCovey*, the federal regulations are quite detailed and comprehensive. They specify the types and sizes of nets that may be used, the locations where the nets may be placed, and the particular days and hours when gill nets may be utilized; they reguire fish caught on the reservation to be marked in a particular manner and limit the number of fish Indians may transport off the reservation without a special permit. To facilitate the enforcement of the regulations, all eligible Indians are required to obtain and possess a fisher's identification card before exercising any fishing rights on the reservation. The regulations also establish the applicable punishments that may be imposed for violation of the regulations and establish procedures for the prosecution of such violations.

In addition, the regulations authorize local federal officials to promulgate in-season and emergency regulations when necessary to ensure the proper management of the reservation fisheries, to meet conservation needs and to protect spawning escapement. In order to promote conservation, for much of the period between the initial promulgation of the regulations in 1977 and the present, the federal regulations completely prohibited commercial fishing by Indians in reservation waters.

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[3] The current regulations are contained in sections 250.1 to 250.23 of the Code of Federal Regulations.

B.

Like the present case, *McCovey,* supra, 36 Cal.3d 517, was a state criminal prosecution brought against a Yurok Indian for commercial fishing activities committed while the federal regulations were in effect. The People argued in *McCovey* that because the federal regulations in force at the time of the charged offense themselves prohibited commercial on-reservation fishing by reservation Indians, the state criminal prosecution was compatible with, and not preempted by, federal law.

In *McCovey,* we reviewed at some length the numerous federal authorities which had considered the question of when a state could permissibly apply its own law to an Indian reservation or to tribal members. We explained that the federal cases had recognized " 'two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. [Citation.] First, state authority may be preempted by federal law. Second, it may interfere with 'the right of reservation Indians to make their own laws and be ruled by them.' " (*McCovey,* supra, 36 Cal.3d at p. 525 [quoting White Mountain Apache Tribe v. Bracker (1980) 448 U.S. 136, 142-143].) Furthermore, we noted that the governing federal decisions had established that the preemption doctrine was to be applied with somewhat more vigor in cases involving Indian affairs than in other areas, and had explained that " '[a]lthough a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption, . . . prior cases [do] not limit preemption of State laws affecting Indian tribes to only those circumstances.' " (36 Cal.3d at p. 525 [quoting New Mexico v. Mescalero Apache Tribe (1983) 462 U.S. 324, 333-334].) We also pointed out that in those circumstances in which there is a "pervasive" or "comprehensive" federal regulatory scheme governing a particular aspect of Indian affairs, the controlling federal cases made it clear that "state laws are preempted if they appear to 'disturb and disarrange' that scheme." (36 Cal.3d at p. 526 [quoting Warren Trading Post v. Tax Comm'n. (1965) 380 U.S. 685, 690-691].)

For guidance in the application of these principles, the *McCovey* court turned to the then-recent United States Supreme Court decision in New Mexico v. Mescalero Apache Tribe

(1983) 462 U.S. 324, which had addressed a preemption question in a setting somewhat similar to *McCovey*. In *Mescalero,* the Mescalero Apache Tribe, with extensive federal assistance and supervision, had established a comprehensive scheme for the management of the fish and wildlife resources on its New Mexico reservation, including the regulation of on-reservation hunting and fishing by both members *and nonmembers* of the Mescalero tribe. In that case, New Mexico conceded that it had no jurisdiction to regulate the on-reservation hunting or fishing activities of tribe members, but contended that it could apply generally applicable state hunting and fishing laws to nonmembers who hunted or fished on the reservation, even when such state laws differed in some respects from the hunting and fishing regulations which had been adopted by the tribe. The United States Supreme Court unanimously rejected New Mexico's contention, concluding, inter alia, that application of state law even to non-Indians "would effectively nullify the Tribe's authority to control hunting and fishing on the reservation" and "would completely 'disturb and disarrange' . . . the comprehensive scheme of federal and tribal management established pursuant to federal law." (462 U.S. at p. 338.)

After reviewing the comprehensive nature of the federal regulatory scheme governing Indian fishing on the Hoopa Valley Reservation, we concluded in *McCovey* that, as in *Mescalero,* "[t]here is little question that the exercise of state criminal jurisdiction in this area will 'disturb and disarrange' the federal scheme. [Citation.] Concurrent jurisdiction by the state would supplant the present federal regulatory scheme with an inconsistent dual system." (36 Cal.3d at p. 531.)

As we explained: "The federal regulations permit gill nets to be used to a limited extent, while California completely prohibits their use in the taking of salmon, steelhead or striped bass. [Citations.] The penalties for appellants' conduct in this case are more severe under California law. The maximum fine for a violation of section 8685.6 is $10,000, while the maximum fine under the federal regulations is $500. [Citations.] Violations of the federal regulations are adjudicated in reservation courts before Indian judges and juries, while violations under the Fish and

Game Code are adjudicated in non-Indian courts. [¶] Moreover, state jurisdiction over Indian offenses involving fish caught on the reservation would 'effectively nullify' the express purpose of the federal regulations. [Citation.] With the state asserting its authority in the area, there would be no incentive for the Hoopa Valley Reservation Indians ever to establish a reservation-wide system capable of managing and regulating the resources of the reservation. If the tribe did establish a system, its authority to regulate would have but a 'hollow ring' and the exercise of that authority would be 'only at the sufferance of the State.' [Citation.] Thus, state jurisdiction would thwart Congress' overriding commitment to the encouragement of tribal self-government and economic development." (36 Cal.3d at p. 531.)

Finally, the *McCovey* court turned to the state's claim that its interest in conservation of the scarce salmon resources in the Klamath River nonetheless justified the exercise of state jurisdiction. With respect to this contention, the court noted that while in a *nonpreemption* context the United States Supreme Court, in the *Puyallup* trilogy,[4] had held that a state may, in the interest of conservation, regulate Indian fishing rights which were created by treaty, the Supreme Court had never held that concurrent state regulation for conservation purposes is permissible when there is a comprehensive federal regulatory scheme in place which is intended to serve a similar conservation interest and with which the state regulation conflicts. In this context, the *McCovey* court concluded that "[t]he state's interest in conservation of salmon is adequately protected by the federal regulations. An elaborate federal scheme regulates both on-reservation fishing and off-reservation sales. This factor—entirely absent in the *Puyallup* cases—is itself sufficient to preclude state intervention. Moreover, the existence of accompanying mechanisms for enforcement should adequately dispel the concern that exclusive federal jurisdiction will impact adversely on state resources." (36 Cal.3d at p. 533.)

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[4] See Puyallup Tribe v. Dept. of Game (1968) 391 U.S. 392 (*Puyallup I*); Washington Game Dept. v. Puyallup Tribe (1973) 414 U.S. 44 (*Puyallup II*); Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165 (*Puyallup III*).

As a consequence, the *McCovey* decision squarely held that the state was preempted from exercising jurisdiction over Indian fishing activities encompassed by the federal regulations.

IV

As the Court of Appeal recognized, on its face the *McCovey* decision appears to be on all fours with the instant matter. Defendants, like McCovey, are Yurok Indians charged with violating state fish and game laws on the basis of on-reservation fishing activities which were governed by an applicable comprehensive federal regulatory scheme. Nonetheless, the Court of Appeal determined that *McCovey* was not controlling in the present case. The Court of Appeal relied on two grounds to support its conclusion, but, as we explain, neither ground withstands scrutiny.

A.

First, the Court of Appeal suggested that a legal notice published in July 1985 by the local area director of the Bureau of Indian Affairs, indicating that the salmon population in the Klamath River continued to decline after our decision in *McCovey*,[5] demonstrated that the state's interest in conserving a

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[5] The notice in question, entitled "In-Season Regulation Change Indian Fishing Hoopa Valley Indian Reservation," stated in relevant part: "Under the regulations of the Interior Department governing Indian fishing on the Hoopa Valley Indian Reservation, the Area Director of the Bureau of Indian Affairs is authorized to make in-season and emergency changes to the regulations when necessary to ensure proper management of the fisheries of the Klamath and Trinity Rivers. [¶] . . . The Bureau of Indian Affairs finds that the anadromous fish resources of the Klamath River Basin are in greater jeopardy in 1985 than they were in 1979. Chinook stocks have declined , . . The run size has reached a point where the spawning population on some tributary streams in the Klamath Basin may be in danger of being elininated. Any further reductions in run size also make the resource increasingly vulnerable to the adverse impacts of natural phenomena such as drought, flood or high ocean temperature . . . [¶] The precarious state of

threatened natural resource had become sufficiently compelling to justify concurrent state jurisdiction over Indian fishing in the Klamath River.

To begin with, however, even if a change in circumstances subsequent to *McCovey* might justify the state's institution of emergency measures to protect a threatened resource from imminent extinction, such a rationale could not be applied to sustain the criminal charges at issue in this case, which are based on conduct which occurred in 1981, three years prior to the *McCovey* decision. A change of circumstances *after McCovey* obviously could not alter the preemptive effect of the federal regulations in a case which arose well *before McCovey*.

Furthermore, in light of our analysis in *McCovey*, it is clear that a mere change of circumstances—such as the continuing decline in the salmon runs in the Klamath River—would not in itself be sufficient to alter that decision's preemption determination, particularly in the absence of a showing that the federal government or tribal authorities were failing to take conservation measures to protect the endangered resource. Here, the Bureau of Indian Affairs document to which the Court of Appeal referred itself

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the resouce has caused the United States Commerce Department and the states of California and Oregon to ban the commercial harvest of salmon in those waters that have high concentrations of Klamath origin chinook. The Bureau of Indian Affairs has already responded to this crisis by imposing closures on the Indian fishery designed to significantly enhance the escapement of salmon to the spawning area. [¶] The Bureau of Indian Affairs has concluded that these closures will produce the required harvest reductions to preserve the resource and allow limited fishing for ceremonial and subsistence purposes. There is a significant risk that these closures will not result in the necessary harvest reductions if fishing pressure is increased by persons intending to sell all or part of their catch. . . . [¶] The Interior Department recently issued a draft environmental impact statement which proposed to permit the exercise of Indian commercial fishing rights pursuant to a fishery management plan when the expected run size exceeds subsistence, ceremonial and spawning needs. Those conditions do not exist for the 1985 season. [¶] Based on the foregoing considerations, commercial fishing on the Hoopa Valley Indian Reservation and the sale of fish caught on that reservation is prohibited."

demonstrates that the federal authorities had in fact taken substantial action in response to the increased risk to Klamath River salmon, and were by no means defaulting in their conservation tasks. (See fn. 5, *ante.*)[6] Under these circumstances, we conclude that there was no justification for the Court of Appeal's determination that *McCovey's* holding was no longer controlling.[7]

B.

The Court of Appeal alternatively suggested that because the *McCovey* decision did not explicitly advert to the fact that a majority of Klamath River salmon are hatched outside the Hoopa Valley Reservation, in state fish hatcheries or other nonreservation spawning grounds, "[o]ne may read [the *McCovey*] holding

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[6] The parties have presented a number of reports, prepared by federal and state agencies which monitor fishing runs in the Klamath River, which indicate that the size of the salmon runs in the river has increased significantly since July 1985. The improvement has apparently resulted, at least in substantial part, from the cooperative efforts of numerous federal and state agencies which have jurisdiction over various aspects of both ocean and in-river salmon fishing. (See 16 U.S.C. § 460ss et seq., added by Pub.L. No. 99-552 (Oct. 27, 1986) 100 Stat. 3080 [establishing Klamath Fishery Management Council]; Fish & G. Code, § 16500 et seq., added by Stats. 1986, ch. 1186, § 1, pp. ____ [authorizing state representative to negotiate and approve agreement authorizing commercial fishing by Indians in Klamath River under specified circumstances].)

[7] In his concurring opinion, Justice Kaufman suggests that under *McCovey* and the relevant federal authorities, the state retains the right to adopt new provisions applicable to Indian fishing on the reservation if the provisions are narrowly tailored to meet an exigency threatening an endangered species and if the state can adduce sufficient facts to show that such a regulation serves a compelling interest which the federal regulations do not address or fail to safeguard. (See *post,* p. [typed opn., pp. 3-4].) Because no such newly adopted, narrowly tailored state regulation is involved in this case, we have no occasion to decide whether such a state provision could properly coexist with the applicable federal regulations (cf. Metlakatla Indians v. Egan (1962) 369 U.S. 45) and we express no opinion on that matter.

as limited solely to those fish resources which spawn in reservation waters or which were stocked by [Department of] Interior fisheries." The Court of Appeal was apparently of the opinion that *McCovey's* preemption analysis was applicable only to "an exclusive reservation resource" and did not apply to fish which originated outside of the reservation.

To begin with, we believe it is clear from the *McCovey* decision that the *McCovey* court was well aware that a substantial portion of Klamath River salmon spawn outside reservation waters. (See *McCovey,* supra, 36 Cal.3d at p. 524, fn. 7.) Furthermore, the Court of Appeal cited no authority which suggests that Indian fishing rights in reservation waters extend only to fish which are hatched within the boundaries of the reservation, and we know of no decision which supports such a proposition. (Cf. United States v. State of Washington (9th Cir. 1985) 759 F.2d 1353, 1358-1360, cert. den. 474 U.S. 994 [state hatchery fish are subject to allocation under Indian treaties].) In any event, the state provisions at issue in this case do not purport to draw any distinction between fish which hatch outside reservation waters and those which hatch within the reservation but rather extend their broad prohibitions to all fish. Even if a state could properly establish a special interest in the regulation of a state-created resource, it would clearly be incompatible with the independent nature of Indian fishing rights to suggest that a state may obtain broad authority to prohibit all on-reservation gill-net or commercial fishing by reservation Indians whenever it establishes hatcheries outside a reservation and permits fish from such hatcheries to pass through reservation waters.

Thus we conclude that the fact that many Klamath River salmon hatch outside the boundaries of the Hoopa Valley Reservation, has no effect on our holding in *McCovey* that the applicable federal regulations—which draw no distinction between reservation- and nonreservation-bred salmon—preempt the state from applying the relevant state fish and game laws to on-reservation fishing activities by reservation Indians.

Accordingly, neither of the rationales on which the Court of Appeal relied justifies a departure from the *McCovey* ruling.

V.

The People alternatively suggest that the result reached by the Court of Appeal should be sustained on an entirely different, and much more radical and far-reaching, theory. The People maintain (1) that, notwithstanding *McCovey* and numerous other state and federal decisions, the Indians of the Hoopa Valley Reservation in fact do not possess *any* federally reserved fishing rights in the Klamath River at all, and (2) that the federal government lacked the constitutional authority to establish the regulations over Hoopa Valley Reservation fishing which this court found preemptive in *McCovey*. The People argue that when California was admitted to statehood in 1850 the Klamath River was a navigable body of water whose title passed from the federal government to the state (see, e.g., Pollard's Lessee v. Hagan (1845) 44 U.S. (3 How.) 212; Shively v. Bowlby (1894) 152 U.S. 1), and thus in 1891 the federal government had no interest in the Klamath River or its fish resources that it could properly pass to the Indians through the creation of the reservation. The People assert that the federal authorities recognized this state of affairs in 1891 and that the 1891 federal executive order which extended the original Hoopa Valley Reservation to include the old Klamath River Reservation actually excluded the Klamath River from the reservation. According to the People's argument, California retains sole jurisdiction over the Klamath River and its fish resources and thus may regulate Indian fishing in the Klamath River free from any federal restraints.

To support the argument, the People request the court to take judicial notice of a number of historical documents which they assert support their interpretation of the 1891 executive order.[8]

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[8] The historical documents include (1) an 1889 opinion of the United States Attorney General (S. Exec. Doc. No. 140, 50th Cong., 2d Sess. (1889) printed in 4 Sen. Exec. Docs., 50th Cong., 2d Sess. and Special Sess. (Mar. 4, 1889), Nos. 131-147); (2) a letter, dated January 20, 1891, from the Office of the Assistant Attorney General for the Department of the Interior to the Secretary of the Interior; (3) a letter, dated October 12, 1891, from the Secretary of the Interior to the President of the United States; and (4) a 1940 opinion of the Solicitor of the

Defendants vigorously oppose the request, suggesting that many of the purportedly factual statements in the documents are actually subject to dispute and additionally maintaining that the documents should have been presented at the preliminary hearing. We need not decide whether defendants' objections to judicial notice are well taken because we conclude that, in any event, the legal theory on which the People rely is untenable for a number of reasons.

To begin with, the People's broad claim that Yurok Indians enjoy no federally protected fishing rights in the Klamath River flies directly in the face of *all* of the recent federal and state decisions involving Yurok Indian fishing on the Hoopa Valley Reservation. As we have seen, in 1975 the California Court of Appeal specifically held in *Five Gill Nets,* supra, 48 Cal.App.3d 454, certiorari denied (1976) 425 U.S. 907, that state regulation of such on-reservation Indian fishing was preempted by the Indians' federally protected fishing rights; that holding, of course, is totally incompatible with People's present contention that the Yurok Indians enjoy *no* federally protected fishing rights in the Klamath River. Similarly, more recent federal decisions have likewise expressly recognized that "[t]he right to take fish from the Klamath River was reserved to the Indians when the reservation was created." (United States v. Eberhardt, supra, 789 F.2d 1354, 1359; see Blake v. Arnett, supra, 663 F.2d 906, 909; Pacific Coast Fed. v. Secretary of Commerce (N.D. Cal. 1980) 494 F.Supp. 626, 632, 633.) And, of course, our *McCovey* decision also expressly held that the Yurok Indians possess federally reserved fishing rights in the Klamath River which are properly subject to federal regulation. (*McCovey,* supra, 36 Cal.3d at p. 534.)

Although the People acknowledge that their current contention is inconsistent with the opinions in each of these cases, they argue that because none of the prior decisions expressly considered the particular historical evidence or legal theory on which they now rely, those decisions should not be considered controlling author-

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Department of the Interior (1 Opns. Solic., Dept. of Inter. Rel. to Indian Affairs (1917-1974) pp. 945-948.)

ity. The reach of those decisions, however, may not be so readily circumvented. The issue of the existence of federally reserved Indian fishing rights was directly in question in each of these cases, and the State of California was in fact a principal litigant in several of the proceedings. The People had ample opportunity in the prior litigation to challenge the validity of Indian fishing rights in the Klamath River on the theory they now urge. Having failed to successfully pursue such a legal argument in those cases, they may not avoid the holdings of those decisions at this juncture by resort to ostensibly newly discovered historic evidence or a new legal theory. (See, e.g., Price v. Sixth District Agricultural Assn. (1927) 201 Cal. 502, 511 ["an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result."].) This is particularly true in a situation, like the present one, where many individuals have relied on the past decisions over a number of years and where a comprehensive federal regulatory scheme—adopted in the wake of the earlier decisions—has been in place for more than a decade. (Cf. Arizona v. California (1963) 373 U.S. 546, 598.)

Furthermore, the People's argument is not only defeated by the past judicial decisions but fails on its substantive merits as well. The People's fundamental assertion—that, after California's entry into the union, the federal government lost any right to reserve Indian fishing rights in the Klamath River through the establishment of an Indian reservation on federally owned land adjacent to the river—is quite similar to a claim which the United States Supreme Court expressly rejected 25 years ago in the case of Arizona v. California, supra, 373 U.S. 546. In that case, the State of Arizona challenged the right of the federal government to reserve water rights for Indians in the Colorado River through the creation of new Indian reservations in Arizona after Arizona had become a state. In rejecting the claim, the court explained: "Arizona's contention that the Federal Government had no power, after Arizona became a State, to reserve waters for the use and benefit of federally reserved lands rests largely upon statements in Pollard's Lessee v. Hagan, . . . and Shively v. Bowlby. . . . Those cases and others that followed them gave rise to the

doctrine that lands underlying navigable waters within territory acquired by the Government are held in trust for future States and that title to such lands is automatically vested in the States upon admission to the Union. *But those cases involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property.*" (373 U.S. at pp. 597-598 [emphasis added, fn. omitted]; see also United States v. New Mexico (1978) 438 U.S. 696, 698.) Although the reserved rights in *Arizona v. California* involved the Indians' use of water for irrigation purposes, the People have cited no authority which suggests that Indian fishing rights, which may be equally central to Indian survival and self-sufficiency, are any less eligible for federal reservation and protection. (See Blake v. Arnett, supra, 663 F.2d 906, 909 ["at the time when the Reservation was first created," the fishing rights of Yurok Indians " 'were not much less necessary to the existence of the Indians than the atmosphere they breathed' "]. See generally United States v. Winans (1905) 198 U.S. 371, 381-382; Menominee Tribe v. United States (1968) 391 U.S. 404, 406; F. Cohen, Handbook of Federal Indian Law (1982 ed.) ch. 8, § B2, pp. 449-450.)

The People additionally argue that even if the federal government had the power to reserve Indian fishing rights in the Klamath River when it extended the Hoopa Valley Reservation in 1891, the contemporaneous historical documents of which they urge the court to take judical notice demonstrate that there was in fact no intent to reserve such rights. The documents in question, however, go no further than to indicate that the state, upon entry into the union, acquired title to the river bed of the Klamath River and its resources; they do not state, nor imply, that the federal government, in extending the Hoopa Valley Reservation to include the old Klamath River Reservation, did not intend to protect the Indians' traditional fishing rights in the river. Indeed, as a number of judicial decisions have recognized, the Indians'

fishing activities in the Klamath River were in fact central to the 1891 extension of the reservation.

Three quarters of a century ago, the United States Supreme Court, in Donnelly v. United States, supra, 228 U.S. 243—the initial decision analyzing the 1891 extension of the original Hoopa Valley Reservation to include the old Klamath River Reservation—emphasized the primary role that the river and Indian fishing activities played in the decision to establish the current boundaries of the reservation. As the court observed: "[I]n view of all the circumstances, it would be absurd to treat the [1891 executive] order as intended to include the uplands to the width of one mile on each side of the river, and at the same time to exclude the river. . . . *The reports of the local Indian agents and superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence,* and the river is described as running in a narrow canyon through a broken country, the Indians as dwelling in small villages close to its banks. [Citations.]" (Emphasis added.) (228 U.S. at p. 259.)[9] In short, the reason the extension of the Hoopa Valley Reservation took the form that it did was in recognition of the Yurok Indians' historic reliance on the fish resources of the Klamath River. (See also Mattz v. Arnett, supra, 412 U.S. 481, 487; Arnett v. Five Gill Nets, supra, 48 Cal.App.3d 454, 461; Pacific Coast Fed. v. Secretary of Commerce, supra, 494 F.Supp. 626, 633.) Thus, we

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[9] In the initial opinion issued in *Donnelly,* the Supreme Court concluded both that the river was included in the reservation and that the then-applicable California statutes established that, for purposes of California law, the Klamath River was considered a non-navigable stream. (228 U.S. at pp. 259-264.) On petition for rehearing, the defendant took issue with the court's interpretation of the California statutes relating to navigability, and the court—noting that the navigability question had not been pursued at trial—withdrew that portion of its initial opinion relating to the California statutes on navigability. (228 U.S. at pp. 708-712.) The court nonetheless upheld the defendant's conviction, reaffirming the conclusion that the trial court has properly found that the crime, which had been committed either on the river or its banks, was committed within the reservation and fell within the jurisdiction of the federal statute.

reject the People's contention that the United States lacked either the power or the intent to protect the Yurok Indians' historic fishing rights in the Klamath River when it extended the Hoopa Valley Indian Reservation in 1891.

VI.

The judgment of the Court of Appeal is reversed and the proceeding is remanded to that court with directions to issue a peremptory writ of prohibition restraining further prosecution of the underlying criminal charges.

ARGUELLES, J.

WE CONCUR:

Lucas, C.J.
Broussard, J.
Eagleson, J.

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MATTZ v. SUPERIOR COURT
S002805

CONCURRING OPINION BY KAUFMAN, J.

I concur in the judgment, but write separately out of a concern that the majority opinion may be read as holding that the State of California is forever and in all circumstances barred from acting to preserve a scarce natural resource located on Indian lands within the state. As explained below, I do not read either People v. McCovey (1984) 36 Cal.3d 517 or the pertinent federal authorities as so holding, nor, in my view, does our decision today preclude the exercise of concurrent state jurisdiction over tribal activities on Indian lands where the state's interest is sufficiently compelling. Both the United States Supreme Court and the Ninth Circuit Court of Appeals have held that the preservation of a scarce, common resource may constitute such an interest. (New Mexico v. Mescalero Apache Tribe (1983) 462 U.S. 324, 342; Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165, 173-177; United States v. State of Or. (9th Cir. 1983) 718 F.2d 299, 304-305; see also People v. McCovey, supra, 36 Cal.3d at p. 532, fn. 18.) When federal law is silent or unavailing, state law must be adequate to preserve the survival of endangered fish and wildlife resources.

A. *Prosecution Is Barred in This Case*

As noted above, I concur in the majority's conclusion that our holding in *McCovey* bars the prosecution of defendants in this matter. The alleged violations of Fish and Game Code sections 8434 and 8685.6 occurred in 1981, three years prior to our holding in *McCovey* that federal regulations preempt the state's fishery conservation laws as applied to the Hoopa Valley Indian Reservation. Thus, *McCovey* is clearly dispositive of this matter. Even if one were to accept the Court of Appeal's novel theory that changes in the escapement levels of Klamath River salmon could somehow resurrect sections 8434 and 8685.6 from the dustbin of preemption, the prosecution in this case would not be valid, as the violations occurred prior to the alleged change of curcumstances.

Moreover, the broader ramifications of the Court of Appeal's theory are simply unacceptable. When escapement levels of salmon are high, the theory suggests, *McCovey* governs; when low, *McCovey* may be ignored. The Court of Appeal would thus reduce our holding to little more than a chimera, subject to the whim of the prosecutor and the fortunes of the anadromous fish. Clearly, this approach must be rejected.

Equally unacceptable, however, is the notion—vigorously condemned by Justice Mosk in his dissenting opinion—that "the State of California is necessarily and for all time barred from conserving a natural resource located within its borders." (Dis. opn. of Mosk, J. at p. [typed opn. at p. 1].) Our decision in *McCovey,* it should be emphasized, does not stand for the proposition that federal "conservation" regulations preempt this state's environmental protection laws under any and all circumstances. While a full exploration of *McCovey's* impact on cases unrelated to the Hoopa Valley Indian Reservation must necessarily await another day, it is clear, in my view, that even "pervasive" federal regulatory schemes leave room for state laws directed explicitly to the preservation of an endanged species and supported by a sufficiently compelling factual record.

In the unusual case, such as that presented here, where we previously held that existing federal regulations "adequately protected" the state's interest (People v. McCovey, supra, 36 Cal.3d at p. 533), but subsequent events occur which suggest otherwise, a valid assertion of state regulatory authority would require (1) that the state adopt *new* provisions narrowly tailored to meet the exigency, and (2) adduce sufficient facts to show that the state law serves a compelling interest which the federal regulations do not address or fail to safeguard. Although the state in this matter failed to meet these criteria, as explained below, I believe that both state and federal decisions allow such an exercise of state authority.

B. *Federal Preemption of State Environmental Laws*

So far as I am aware, no court has ever decided that a state lacks the power to regulate tribal fishing on an Indian reservation in the express interest of preserving an endangered anadromous

fish population. Mattz v. Arnett (1973) 412 U.S. 481 held merely that the Klamath River Reservation had not been extinguished, but expressed no view as to the state's authority to regulate fishing on the reservation. (Id. at p. 485.) On remand in Arnett v. Five Gill Nets (1975) 43 Cal.App.3d 454, the Court of Appeal did not reach the issue because it found that state intervention "in the interest of preserving the fish" was not supported by the record. (Id. at pp. 463-464.) Similarly, our decision in *McCovey* was based, in part, on the fact that the state had not shown the exercise of its police power was necessary to preserve a scarce, common resource. (36 Cal.3d at pp. 532-533.) Our holding today, in my view, stands only for the limited proposition that state intervention may not be premised upon laws previously held to be preempted.

What these and other decisions do establish, however, is the principle that state jurisdiction over fish and wildlife resources located on federally regulated Indian reservations depends, in part, upon the nature of the state interests asserted. Though it is admittedly the rare case, the United States Supreme Court has nevertheless expressly recognized "that in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." (New Mexico v. Mescalero Apache Tribe, supra, 462 U.S. at pp. 331-322.) In so stating, it is significant that the high court referred expressly to Puyallup Tribe v. Washington Game Dept., supra, 433 U.S. 165, the third in a trilogy of cases dealing with the State of Washington's authority to regulate on-reservation fishing by members of the Puyallup tribe. Though not a preemption matter, the United States Supreme Court's recognition of the State of Washington's "power to conserve an important natural resource" is significant. (Id. at p. 175.) Coupled with Justice Douglas's typically pungent observation in *Puyallup II* (Washington Game Dept. v. Puyallup Tribe (1973) 414 U.S. 44) that the State of Washington's "police power . . . is adequate to prevent the steelhead [trout] from following the fate of the passenger pigeon," (id. at p.49), it suggests that a state's jurisidction to preserve an endangered species survives the enactment of a federal regulatory scheme—even one which includes "conservation" among its stated goals.

Preemption of California environmental protection laws does not automatically follow from a finding that federal regulations applicable to Indian lands appear to address "similar" concerns. (Maj. opn., ante, at p. [typed opn. at p. 19].) The instant matter presents a classic case in point. The fishing regulations promulgated by the Bureau of Indian Affairs for the Hoopa Valley Indian Reservation state several goals: the protection of the reservation's fishery resources, the ensurance of equal access to the fishery resources by all eligible Indians, the preservation of fishing for traditional subsistence and ceremonial purposes as well as the promotion of economic self-sufficiency through commercial fishing. (25 C.F.R., §§ 250.1, 250.9.) The federal regulations permit the limited use of gill nets for these purposes. (25 C.F.R., § 250.9.)

McCovey found—on the facts presented—that the foregoing federal scheme "adequately protected" the "state's interest in the conservation of salmon." (36 Cal.3d at p. 533.) As we explained: "[T]he state has not shown that its interest in conservation is sufficient to justify assertion of concurrent authority. Thus, the state is preempted from exercising jurisdiction over appellant McCovey." (Ibid.)

McCovey, however, did not consider the validity of state intervention pursuant to a state statute or regulation enacted for the express preservationist or "environmentalist" purpose of preserving an endangered species from imminent extinction. I do not mean to suggest that this is the only circumstance in which state intervention would be proper. I do suggest, however, that an environmentalist measure of this nature differs in kind from the typical "conservationist" regulations enacted by the Bureau of Indian Affairs under the aegis of the Department of the Interior. The objective of the federal government in this, as in many other cases, is sustained economic development on the reservation enlightened by rational management of its resources. This "scientific" approach to resource management lies at the heart of the "conservationist" ethic, an idea championed by the Progressives at the turn of the century and since institutionalized by resource management experts in various government agencies. (See Hays, Conservation and the Gospel of Efficiency: The Progressive

Conservation Movement 1890-1920 (1959) pp. 1-4, 145-146.) "Environmentalism," on the other hand, is a movement of more recent origins, and generally has as its goal the *preservation* of resources *from* development. (See Schrepfer, The Fight to Save the Redwoods: A History of Environmental Reform 1917-1978 (1983) pp. 16, 229-244; Weyeneth, *The Color Green: Politics in the Age of Ecology* (1988) 16 Reviews in American History 298, 303-305.)

I am not suggesting that the federal regulations at issue here contemplate the annihilation of the Klamath River salmon. On the contrary, as noted above, they appear to seek *sustained* economic development. I do suggest, however, that federal conservationist goals are not necessarily congruent with local environmental concerns. The federal regulations, it must be remembered, seek to create private rights on the reservation for purely personal financial gain. As the Court of Appeal noted, however, that small stretch of the Klamath River which passes through the reservation serves as a veritable "gateway" for salmon seeking freshwater spawning grounds hundreds of kilometers away from the reservation. Many of these salmon actually originated in state-operated hatcheries located off the reservation. What occurs on the reservation may dramatically affect fishery resources throughout the state. Thus, the state has a distinct and valid interest in the preservation of this common resource for all of its citizens.

Accordingly, the existence of a federal regulatory scheme that purportedly includes among its goals the "conservation" of reservation resources does not terminate the preemption analysis. Courts must continue to determine the respective federal, state and tribal interests, and where a sufficiently compelling environmental concern—such as the preservation of an endangered species—necessitates state enforcement, must be free to find concurrent state jurisdiction.

KAUFMAN, J.

I CONCUR:

PANELLI, J.

COPY

MATTZ et al. v. SUPERIOR COURT

S002805

DISSENTING OPINION BY MOSK, J.

I dissent.

The majority embrace the opinion of Chief Justice Bird for a unanimous court in People v. McCovey (1984) 36 Cal.3d 517. I agreed with that opinion and signed it.

However, I do not concede that the State of California is necessarily and for all time barred from conserving a natural resource within its borders. As was pointed out in Donahue v. Jusitce Court (1971) 15 Cal.App.3d 557, 564: "Congress may, of course, enact legislation limiting the right . . . to fish on the reservation. . . . Likewise the state is not precluded from exercising its general police power under factual situations reasonably requiring the exercise of such power." I believe the State of California has now demonstrated a factual situation justifying the use of its police power.

It is not necessary to recite the entire opinion of the Court of Appeal in this case, but I do adopt as my own the concolusion of Justice Haning, for himself and Presiding Justice Low and Justice King:

We conclude that the state's concurrent jurisdiction over tribal salmon fishing in the Klamath River is not preempted by the federal regulations. We are of the view that *McCovey* does not directly apply to the case before us, for two reasons.

First, in the context of the conservation of a finite, threatened natural resource the state's regulatory ability is not static. The conservation of such a natural resource is sufficiently compelling to enable the state to assert a more powerful need for conservation. The People have presented clear indications that after *McCovey* was decided the Klamath River population continued to decline. The Bureau of Indian Affairs found that the salmon population was in greater jeopardy in 1985 than in 1979 when the

moratorium was first imposed. In fact, the bureau concluded—after *McCovey* was decided—that the spawning run was "*in danger of being eliminated.*" *McCovey,* as well controlling precedent of the United States Supreme Court, does not preclude concurrent state jurisdiction over a precarious state resource. As the Ninth Circuit has recently ruled, a state may regulate Indian fishing if its regulation is reasonable and necessary for conservation. "Unlike Congress, states may not qualify Indian fishing rights. *Puyallup Tribe v. Department of Game (Puyallup I),* 391 U.S. 392, 398 (1968); [*United States v.*] *Sohappy,* 770 F.2d [816,] 823; [*United States v.*] *Fryberg,* 622 F.2d [1010], 1014-15. However, states may regulate Indian rights in the interest of conservation by an appropriate exercise of their police power. State regulation for conservation purposes is based on the state's interest in protecting fish and wildlife resources for the benefit of its citizens. *See Puyallup Tribe v. Department of Game (Puyallup III),* 433 U.S. 165, 175-76 (1977); *see also United States v. Michigan,* 653 F.2d 277, 279 (6th Cir.), *cert. denied,* 454 U.S. 1124 (1981). The violation of state conservation laws is a federal offense. 16 U.S.C. § 3372(a)(2) (1982); *see Sohappy,* 770 F.2d at 834-24. [¶] A state must show that any regulation of Indian fishing rights is both reasonable and necessary for conservation purposes. *Antoine v. Washington,* 420 U.S. 194, 207 (1975); *Sohappy,* 770 F.2d at 823. State regulations meeting these standards may extend to the manner of fishing, the size of the take, and the restriction of commercial fishing. *Puyallup I,* 391 U.S. at 398. In the context of state regulation of Indian fishing rights, we have rejected the endangered species approach to conservation, finding that fishing limitations may be proper even though extinction is not imminent. United States v. Oregon, 718 F.2d 299, 305 (9th Cir. 1983)." (United States v. Eberhardt, supra, 789 F.2d at pp. 1361-1362.) In light of the post-*McCovey* diminution of the salmon run to the point of imminent demise, we can easily distinguish the situation which now faces us from that [in *McCovey* in 1984].

Second, and perhaps of greater signifiance, *McCovey,* as well as *Arnett* [Arnett v. Five Gill Nets (1975) 48 Cal.App.3d 454] assumed the Klamath river salmon at issue therein were exclusively a reservation resource. One may read its holding as limited

solely to those fish resources which spawn in reservation waters or which were stocked by Interior fisheries. In fact, however, the majority of Klamath River salmon runs are a state resource, which has been substantially enhanced over the years by stocking efforts of the State Resources Agency at the Iron Gate Salmon and Steelhead Hatchery, located outside the Reservation boundary upstream from the reservation. (See, e.g., State of Cal. Resources Agency, Dept. of Fish & Game, Ann. Rep. Iron Gate Salmon & Steelhead Hatchery 1983-1984, Admin. Rep. No. 85-01 (1985), of which we take judicial notice.)

McCovey did not hold that California's salmon and steelhead stock, added to the upstream Klamath waters through state fish hatcheries or other nonreservation spawning grounds, is to be governed by the same considerations as an exclusive reservation resource such as the deer resource discussed in *Mescalero* [New Mexico v. Mescalero Apache Tribe (1983) 462 U.S. 324]. Neither *McCovey* nor *Arnett* held that the state could not protect its own fish from extinction. We therefore conclude that the anadromous fish traversing the Klamath River passage are not under the total dominion of the Yurok Tribe, and petitioners' gill netting may be regulated by the State of California in the interests of conservation, and the protection of its own fish.

Accordingly, the petition for writ of prohibition [should be] denied. [End of Court of Appeal opinion, parallel citations omitted, fn. omitted.]

MOSK, J.

Appendix B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

A024108
Del Norte County Superior Court
No. 82-053

Diane Sue Mattz, Antone Folkins and Kenneth Mattz,
Petitioners,

v.

Superior Court of the State of California
for the County of Del Norte,
Respondent,
People of the State of California,
Real Party in Interest.

In this decision we hold that for purposes of protecting state hatched fish returning to state hatcheries and spawning grounds, and also to prevent the extinction of a valuable natural resource, the State of California may reasonably regulate commercial gill netting by members of the Yurok Indian tribe on the Klamath River.

Petitioners are members of the Yurok Tribe who commercially fish the Klamath River on Northern California's Hoopa Valley Indian Reservation. They are charged in the Superior Court of Del Norte County with violating and conspiring to violate criminal provisions of the California Fish & Game Code which prohibit the sale of fish taken from the Klamath River by means of a gill net. (Fish & G. Code, §§ 8434, 8685.6; Penal Code, § 182.) Petitioners seek a writ of prohibition to prevent further criminal proceedings, contending that California state law is preempted by the federal regulations governing fishing on the Hoopa Valley Reservation, which have been promulgated under the authority of the federal government to regulate Indian affairs. In response, the

People assert a state interest in conservation of the Klamath River salmon population, which they contend is sufficient to counteract federal preemption and permit the exercise of concurrent state jurisdiction over Indian commercial fishing. We agree with the People and deny the peremptory writ.

I

This is but the latest chapter in the legal history of the Hoopa Valley Reservation and the fishing activities of the Yurok tribe. To present this case in its proper context, we preface our discussion with a brief review of the history and background of the Reservation and governmental attempts at regulating the salmon fishing of the Reservation tribes.

The Hoopa Valley Indian Reservation consists of a one-mile strip of land on either side of the Klamath River, beginning at the river's mouth at the Pacific Ocean and extending upstream to the River's confluence with the Trinity River. At this point of confluence the Reservation widens to a 12-mile square. (See *People v. McCovey* (1984) 36 Cal.3d 517, 521, *cert. denied* (1985) 469 U.S. 1062; *Mattz v. Arnett* (1973) 412 U.S. 481. [A map of the Reservation is attached as an appendix to both the *Mattz* and the *McCovey* decisions.])[1] The Yurok tribe, whose name means "down the river," inhabits the downriver portion of the Reservation which encompasses the lower Klamath River. (*Mattz v. Arnett, supra,* 412 U.S. at pp. 485-86, citing A. Kroeber, Handbook of the Indians of California, published as Bulletin 78, Bureau of American Ethnology 1-97 (1925); and S. Powers,

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[1] For detailed accounts of the history and geography of the Hoopa Valley Reservation, see *Mattz v. Arnett, supra,* 412 U.S. at pp. 485-503; *People v. McCovey, supra,* 36 Cal.3d at pp. 523-24; and *United States v. Wilson* (D.C.Cal. 1985) 611 F.Supp. 813, 815, *revs'd and remd'd United States v. Eberhardt,* (9th Cir. 1986) 789 F.2d 1354. See also *Arnett v. Five Gill Nets* (1975) 48 Cal.App.3d 454, 456-58, *cert. den.* (1976) 425 U.S. 907; *Elser v. Gill Net Number One* (1966) 246 Cal.App.2d 30, 33-34; and *Donnelly v. United States* (1913) 228 U.S. 243, 253-59, for additional historical background.

Tribes of California, published as 3 Contributions to North American Ethnology 44-64 (1877).)

The Klamath river serves as a passageway for several species of anadromous fish, including salmon and steelhead. "Anadromous species hatch in fresh water, grow to maturity in the ocean, and return to fresh-water streams to spawn." (*United States v. Eberhardt, supra,* 789 U.S. at p. 1357, fn. 4.) The Klamath River salmon and steelhead begin their lives in the freshwater spawning grounds at the headwaters of the River and its tributaries and in state-owned hatcheries, and swim out to the Pacific to maturity. The relatively small number of fish which survive to reach the sea and grow to maturity return to the headwaters of their birth to spawn the next generation. The salmon then die. The returning salmon and steelhead travel upstream in large schools, or "runs," which become targets for commercial fishers who drape gillnets across the river, capturing substantial portions of the run before it can reach the upstream spawning grounds.[2] Because a small portion of the Klamath River flows through the confines of the lower Hoopa Valley Reservation, virtually all of the commercial fishers are Yurok Indians who claim a tribal right to commercially fish the river.

To preserve the anadromous fish resource and achieve minimum desirable population levels in the next generation, a minimum "escapement level" must be ensured; i.e., a certain minimum number of fish must escape the gill nets and return to their spawning grounds. (See *United States v. Eberhardt, supra,* 789 F.2d at p. 1357, fn. 4; see also *People v. McCovey, supra,* 36 Cal.3d 517, 524, fn. 7.) Largely to ensure an escapement level sufficient to preserve the salmon population, both the United States Government and the State of California regulate, or attempt to regulate, commercial fishing on the Klamath River.

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[2] "A gill net is a 'flat net suspended vertically in the water with meshes that allow the head of a fish to pass trhough or become entangled.' (25 C.F.R. § 250.4.) when a fish gets caught in the net, it helplessly struggles to free itself. In the process, the net takes a band of scales off the fish leaving markings referred to as 'gill net marks.' " (*People v. McCovey, supra,* 36 Cal.3d at p. 521, fn. 3.)

State regulation of salmon fishing began in 1933 with the enactment of California Fish and Game Code section 8434, an outright prohibition of commercial fishing on the Klamath River. The state's regulatory role receded in the wake of the Court of Appeal's decision in *Arnett v. Five Gill Nets* (1975) 48 Cal.App.3d 454, *cert. denied* (1976) 425 U.S. 907, which held that federal law preempted the state's power to regulate fishing on the Klamath within the confines of the lower Hoopa Valley Reservation.

Arnett's ban on state regulation, coupled with the lack of a tribal governing body to assume responsibility for regulating the Indian fishers, created a regulatory void which prompted the federal government to enter the arena in 1977. The federal government promulgated fishing regulations under its authority to regulate Indian affairs through the Department of the Interior (Interior). Interior enacted interim regulations governing Klamath River fishing by Hoopa Valley Indians. (42 Fed. Reg. 40904-40905 (Aug. 12, 1977).) The regulations expressly recognized the Indians had a federally reserved fishing right which included the right to fish commercially in the River; however, the regulations noted the right, like most, was not absolute: "[T]he Indians must be allowed to fish commercially *as long as statistics show that there can be effective conservation,* with simultaneous regulation of other forms of fishing by all persons." (43 Fed. Reg. 30048 (July 13, 1978), emphasis added.)

By 1979, commercial fishing activity had depleted the Klamath River salmon population to the point of insufficient escapement levels, endangering the survival of the species. In response, Interior declared a moratorium on commercial fishing by Reservation Indians. (44 Fed. Reg. 17144-17151 (Mar. 20, 1979).) The moratorium was seen as "the only means by which [Interior] could ensure that a sufficient number of returning fish escaped to reach the spawning areas at the headwaters, thereby permitting conservation and perpetuation of the resource." (*People v. McCovey, supra,* 36 Cal.3d at p. 524, fn. 7, citing 44 Fed. Reg.17144,

supra.)[3] The 1979 moratorium was imposed subject to removel if salmon runs increased to safer levels (44 Fed. Reg. at p. 17146), but the moratorium "remains in effect, having been renewed in successive versions of the regulations." (*People v. McCovey, supra* at p. 524; 25 C.F.R. § 250.8, subds. (d), (e).)

The state continued to urge its right and power to regulate Klamath River fishing. In *People v. McCovey, supra*, the California Supreme Court held that the Interior regulations pre-empted state regulatory authority over the off-reservation sale of reservation catches, with which petitioners are charged, and would at first blush appear to entitle petitioners to a writ of prohibition restraining further prosecution on the state criminal charges. Upon further review we conclude *McCovey* does not bind us to issue the writ, and that the state's interest in conservation of a natural resource justifies concurrent state and federal regulatory jurisdiction over commercial Klamath River fishing.

II

We begin by reviewing the pertinent pronouncements of the United States Supreme Court in the field of federal preemption of state regulation of Indian affairs.

"[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142.) Such questions must

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[3] The Department recognized that the majority of Klamath salmon were taken by offshore commercial fishing vessels before they could reenter the river. Interior, however, had no jurustidction to regulate offshore (and generally non-Indian) commercial fishing, such jurisdiction resting with the Department of Commerce. Noting that Commerce and other involved agencies had not imposed effective limitations on offshore fishing (see 44 Fed. Reg. 17144, *supra*), Interior nonetheless was forced to impose the moratorium as the only available method to save the salmon population. In his concurring opinion in *Eberhardt*, Judge Beezer of the Ninth Circuit suggests an improvement in Commerce's regulation of offshore salmon fishing. (*United States v. Eberhardt, supra*, 789 F.2d at p. 1363 [conc. opn. of Beezer, J.].)

be decided against the "backdrop" of the unique status of Indian tribes under federal law and the traditional notions of Indian self-government. (*Id.*, at p. 143; *Three Affil. Tribes of Ft. Berthold v. Wold Engine*, (1986) U.S. , 106 S.Ct. 2305, 2310.) "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." (*McClanahan v. Arizona State Tax Comm'n* (1973) 411 U.S. 164, 172.) Having been assimilated only partially into American culture, the tribes retain a unique status of semi-independence, as a separate people no longer enjoying the full attributes of sovereignty but empowered to govern their own internal and social relations. (*White Mountain Apache Tribe v. Bracker, supra*, 448 U.S. at p. 142.)

The tribes' semi-independence is subject to the broad power of Congress to regulate Indian affairs under the Commerce Clause. (*White Mountain Apache Tribe v. Bracker, supra*, 448 U.S. at p. 142-143. See *New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324, 332-336; *Ramah Navajo School Bd. v. Bureau of Revenue* (1982) 458 U.S. 832, 837.) This federal regulatory power, plus the tribes' retention of quasi-sovereignty, pose two "independent but related barriers to the assertion of state regulatory authority" over Indian tribes. (*White Mountain Apache Tribe v. Bracker, supra*, 448 U.S. at p. 142; *People v. McCovey, supra*, 36 Cal.3d at p. 525.) The United States Supreme Court has recently suggested that tribal sovereignty alone is insufficient to pre-empt state regulation, noting a "trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." (*Three Affil. Tribes of Ft. Berthold v. Wold Engine.* (1986) U.S. , 106 S.Ct. 2305, 2309, quoting *Rice v. Rehner* (1983) 463 U.S. 713, 718.)

Federal preemption applies in a "special sense" to state regulation of Indian affairs. *New Mexico v. Mescalero Apache Tribe, supra*, 462 U.S. at pp. 333-334.) The "unique historical origins of tribal sovereignty" has led the courts to eschew strict adherance to traditional preemption standards, and to focus instead on a "particularized inquiry into the nature of the state, federal and tribal interests at stake, . . . " *White Mountain Apache Tribe v.*

Bracker, supra, 448 U.S. at pp. 143, 145.) "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico v. Mescalero Apache Tribe, supra,* 462 U.S. at p. 334.)

The preeption cases look to the nature of the federal regulatory scheme. If the scheme is "all-inclusive" or "comprehensive", state laws will be preempted if they "disturb or dissarange" the federal schemata. *(Warren Trading Post v. Tax Comm'n* (1965) 380 U.S. 685, 690-691.) This is particularly true if the federal regulations are the means of furthering a strong federal policy toward the Indians, such as the fostering of tribal self-government or economic or educational self-sufficiency. (See *Ramah Navajo School Bd. v. Bureau of Revenue, supra,* 458 U.S. at pp. 839, 846-847; *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. at pp. 148-149.)

Applying these principles, the United States Supreme Court has consistently preempted state attempts to regulate Indian economic affairs. In *Warren Trading Post,* the Court cited the comprehensiveness of federal regulation of Indian trading on reservations and held a state could not tax gross income on sales made to Indians by an on-reservation trading post. In *Ramah Navajo School Bd.,* the Court held the comprehensive nature of the federal regulations, plus the policy of furthering educational self-sufficiency, prevented the state from taxing a non-Indian construction company's gross receipts from the construction of an Indian school. The court emphasized that "[f]ederal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive." (458 U.S. 832, 839.) Imposition of the state tax on gross receipts was precluded by "the comprehensive federal regulatory scheme" and "the express federal policy of encouraging tribal self-sufficiency in the area of educatioin." (*Id.* at p. 846-847.)

Similarly, in *White Mountain Apache Tribe v. Bracker, supra,* the court held that a state could not impose motor carrier license and use fuel taxes on a non-Indian logging company for its on-reservation logging activities. The rationale for preempting state

regulation of reservation logging mirrored that embraced in *Ramah Navajo School Board*: the federal regulatory scheme governing the harvesting and selling of Indian timber was pervasis, and state regulation would impede and disturb federal regulations and undermine the federal policy of encouraging the Indian tribes to "revitalize their self-government" and assert control over economic affairs. (448 U.S. at pp. 148-149.)

These decisions involve general questions of economic regulation and tribal self-sufficiency: not conservation of a precious and finite environmental resource and the state's significant interest in its regulations in furtherance of resource preservation. The first Indian preemption case to approach application of preemption principles in the environmental context was *New Mexico v. Mescalero Apache Tribe, supra,* and that case involved questions of general wildlife management rather than urgent questions of conserving a fixed resource of fragile survival potential.

In *Mescalero,* the state sought concurrent jurisdiction over tribal wildlife management. New Mexico wished to apply its extensive regulations of hunting and fishing, including licensing requirements, season definitions and bag limits, to hunting and fishing conducted on reservation land. Imposition of these state regulations severely impacted upon, and directly conflicted with, the Apache tribe's efforts to manage and develop its fish and wildlife resources in "a sustained, cooperative effort by the Tribe and the Federal Government." (462 U.S., at pp. 327-328.)

The Supreme Court held the state regulations were preempted for two major reasons. First, the imposition of state regulations would "disturb and disarrange" the federal/Indian joint resource management program. The tribal regulations "reflect[ed] the specific needs of the reservation by establishing the optimal level of hunting and fishing that should occur", based on a continuous series of fine-tuned, expert wildlife management decisions made by federal and Indian experts. (462 U.S. at p. 339; see *id.* at pp. 327-329.) State hunting and fishing laws would be "based on considerations not necessarily relevent to, and possibly hostile to, the needs of the reservation", a circumstance which "could severely hinder the ability of the Tribe to conduct a sound management program." (*Id.* at p. 339.) Examples cited by the

court underscore that general wildlife management, not species-specific conservation, is the touchstone of the holding: for instance, the court observed the tribal regulation permitting a hunter to kill a buck and a doe "was designed to curb excessive growth of the deer population on the reservation," while the state regulation banning the killing of does would frustrate that resource management objective. (462 U.S. at p. 339.) In a similar vein, the tribe's determination of hunting seasons, bag limits and permit availability governed the "duration and intensity of hunting" based on numerous factors, including "the game capacity of the terrain, the range utilization of the range animals, and the availability of tribal personnel to monitor the hunts." (*Ibid.*)

Second, the Court stressed the tribe's exonomic dependence on its wildlife management scheme. "The assertion of concurrent jurisdiction by New Mexico . . . would threaten Congress' overriding objective of encouraging tribal self-government and economic development. The tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. . . . The disruptive effect that would result from the assertion of concurrent jurisdiction . . . would plainly ' "stan[d] as an obstacle to the accomplishment of the full purposes and objectives of Congress." ' " (462 U.S. at p. 341, quoting *Ramah Navajo School Bd. v. Bureau of Revenue, supra,* 458 U.S. at p. 845.)

In summary, the tribal interests in *Mescalero* centered around the ongoing, complex Indian enterprise of managing all reservation fish and wildlife resources—resources renewing themselves by the processes of nature—primarily for the economic benefit of the tribe. The management enterprise did not concern protection of a threatened species subject to elimination from the environment. Indeed, the regulations reviewed in *Mescalero* are premised on the assumption of a natural continuation of the reservation's ecological bounty, and even in some cases required the control, as opposed to the conservation, species population. Certainly *Mescalero* did not involve a species, such as the Klamath River salmon at issue here, which are both threatened with critical

impairment of population levels below a minimum necessary for species survival, and are taken by a "dragnet" fishing method at the spawning run, the very time the salmon are the most vulnerable to population impairment and at the greatest need for protection by conservation regulations. Indeed, the *Mescalero* decision expressly approved the concept of state concurrent jurisidiction for convervation purposes.

The *Mescalero* court acknowledged that a state could regulate the off-reservation impacts of reservation activity to preserve a "scarce, common supply" of a natural resource. The court concluded that New Mexico had failed to show any such effects, especially since "[s]ome species of game never leave tribal lands and the State points to no specific interest concerning those that occasionally do." (*Id.* at p. 342) Moreover, New Mexico in that case had conceded that the Indians' resource management "has not had an adverse impact on fish and wildlife outside the Reservation,' " (*Ibid.*)

In this case, the State of California does not make such a concession and contends that unregulated gill netting endangers the resource In addition, most of the fish do (and in fact, must) leave the reservation and are not solely within the confines of reservation autonomy. It is important that the limited portion of the Klamath River system which flows through the lower Hoopa Valley reservation and into the sea is merely a gateway through which all anadromous fish must pass on their way to their birthplace and spawning grounds. The Trinity, Salmon, Scott and Shasta Rivers, all with their own tributaries, empty into the Klamath River along with numerous upriver creeks containing spawning beds. Those are areas well outside the Del Norte County area in question here, and are protected and regulated by state law. Most significantly, many fish returning upstream are enroute to state hatcheries. Thus, if unregulated or uncontrolled gill netting is allowed to exist, not only will fish which have been reared and released into the river by state fish hatcheries and spawning beds on other state lands, and the species may soon become extinct in those streams.

Therefore, state regulation in this case would not be inconsistent with *Mescalero* because of the need to preserve an at-risk

resource over which the Indians do not have exclusive dominion. "In a nonpreemption context, the [United States Supreme] [C]ourt has held that a state may, in the interest of conservation, regulate Indian fishing rights which were created by treaty." (*People v. McCovey, supra*, 36 Cal.3d at p. 532.) The most famous of these holdings are the "*Puyallup* trilogy": *Puyallup Tribe v. Dept. of Game* (1968) 391 U.S. 392 ["*Puyallup I*"]; *Washington Game Dept. v. Puyallup Tribe* (1973) 414 U.S. 44 ["*Puyallup II*"]; and *Puyallup Tribe v. Washington Game Dept.* (1977) 433 U.S. 165 ["*Puyallup III*"]. In the *Puyallup* cases no comprehensive federal regulatory scheme was in place. The Indians simply enjoyed treaty rights to fish in common with other citizens of the state. (*Puyallup I, supra*, 391 U.S. at p. 398; *Puyallup II, supra*, 414 U.S. at p. 45.) Like the fishing rights of non-Indians, the Indians' rights could be regulated under the auspices of the state's police power to preserve an endangered resource or to otherwise further conservation. (*Puyallup I, supra*, 391 U.S. at pp. 398- 400.)

When the resource at issue is an anodramous fish with a necessary escapement level essential to survival, conservation measures are especially significant. As the late Justice Douglas eloquently observed in *Puyallup II*: "We do not imply that [the Indians'] fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." (414 U.S. at p. 49.)

III

We conclude that the State's concurrent jurisdiction over tribal salmon fishing in the Klamath River is not preempted by the federal regulations. We are of the view that *McCovey* does not directly apply to the case before us, for two reasons.

First, in the context of the conservation of a finite, threatened natural resource the state's regulatory ability is not static. The conservation of such a natural resource is sufficiently compelling to enable the state to assert a more powerful need for conservation. The People have presented clear indications that after *McCovey* was decided the Klamath River population continued to decline. The Bureau of Indian Affairs found that the salmon population was in greater jeopardy in 1985 than in 1979 when the moratorium was first imposed. In fact, the Bureau concluded—after *McCovey* was decided—that the spawning run was "*in danger of being eliminated.*" *McCovey*, as as controlling precedent of the United States Supreme Court, does not preclude concurrent state jurisdiction over a precarious state resource. As the Ninth Circuit has recently ruled, a state may regulate Indian fishing if its regulation is reasonable and necessary for conservation. "Unlike Congress, states may not qualify Indian fishing rights. *Puyallup Tribe v. Department of Game* (*Puyallup I*), 391 U.S. 392, 398 (1968); [*United States v.*] *Sohappy*, 770 F2d [811] 823; [*United States v.*] *Fryber*, 622 F.2d [1010], 1014-15. However, states may regulate Indian rights in the interest of conservation by an appropriate exercise of their police power. State regulation for conservation purposes is based on the state's interest in protecting fish and wildlife resources for the benefit of its citizens. *See Puyallup Tribe v. Department of Game (Puyallup III)*, 433 U.S. 165, 175-76 (1977); *see also United States v. Michigan*, 653 F.2d 277, 279 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981). The violation of state conservation laws is a federal offense. 16 U.S.C. § 3372(a)(2) (1982); *see Sohappy*, 770 F.2d at 834-44. [¶] "A state must show that any regulation of Indian fishing rights is both reasonable and necessary for conservation purposes. *Antoine v. Washington*, 420 U.S. 194, 207 (1975); *Sohappy*, 770 F.2d at 823. State regulations meeting these standards may extend to the manner of fishing, the size of the take, and the restriction of commercial fishing. *Puyallup I*, 391 U.S. at 398. In the context of state regulation of Indian fishing rights, we have rejected the endangered species approach to conservation, finding that fishing limitations may be proper even though extinction is not imminent. *United States v. Oregon*, 718 F.2d 299, 305 (9th Cir. 1983); (*United States v. Eberhardt, supra*, 789 F.2d at

p. 1361-1362.) In light of the post-*McCovey* diminution of the salmon run to the point of imminent demise, we can easily distinguish the situation which now faces us from that before the California Supreme Court when it rendered its 1984 decision.

Second, and perhaps of greater significance, *McCovey* as well as *Arnett*, assumed the Klamath River salmon at issue therein were exclusively a Reservation resource. One may read its holding as limited solely to those fish resources which spawn in Reservation waters or which were stocked by Interior fisheries. In fact, however, the majority of Klamath River salmon run are a state resource, which has been substantially enhanced over the years by stocking efforts of the State Resource Agency at the Iron Gate Salmon and Steelhead Hatchery, located outside the Reservation boundary upstream from the Reservation. (See, e.g., State of California Resources Agency, Department of Fish and Game, *Annual Report Iron Gate Salmon and Steelhead Hatcher 1983-1984,* Administrative Report No. 85-01 (1985), of which we take judicial notice.)

McCovey did not hold that California's salmon and steelhead stock, added to the upstream Klamath waters through state fish hatcheries or other nonreservation spawning grounds, is to be governed by the same considerations as an exclusive Reservation resource such as the deer resource discussed in *Mescalero.* Neither *McCovey* nor *Arnett* held that the State could not protect its own fish from extinction. We therefore conclude that the anadromous fish traversing the Klamath River passage are not under the total dominion of the Yoruk tribe, and petitioners' gill netting may be regulated by the State of California in the interest of conservation, and the protection of its own fish.

Accordingly, the petition for writ of prohibition is denied.[4]

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[4] Because of our disposition of this matter, we need not reach the People's remaining contentions. We reject as without merit the arguments of individual petitioners that the pending criminal charges are not supported by probable cause.

CERTIFIED FOR PUBLICATION

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HANING, J.

WE CONCUR:

_____

LOW, P.J.

_____

KING. J.

CERTIFIED FOR PUBLICATION

Appendix C

SUPERIOR COURT
OF THE
STATE OF CALIFORNIA
COUNTY OF DEL NORTE

Action No. 82-053-C

The People of the State of California,
Plaintiffs,

vs.

Dianne Mattz, Tina Whipple, Antone Folkins,
Kenneth Mattz, Darrell Moorehead,
Raymond Mattz, Andrew Whipple, Marvin Mattz,
Franklin Moorehead & Gilberta Whipple,
Defendants.

[Filed August 26, 1983]

RULING

All defendants challenged the jurisdiction of the Court by way of motions to dismiss, and again in the P.C. 995 motions as to the charges.

The request by the Attorney General that the Court take judicial notice of preferred Exhibits One (1) through Nine (9), and Twelve (12) through Eighteen (18). Twenty-one (21), Twenty-three (23), and Thirty (30) is granted. The offer of the remaining Exhibits Ten (10), Eleven (11), Nineteen (19), Twenty (20), Twenty-two (22), Twenty-four (24), and Twenty-nine (29) is denied.

The preemption analysis did not control questions of the applicability of state law to Indians outside the reservation, *People v. McCovey*, 145 CA 3d 190.), and,

Indians going beyond reservation boundaries . . . have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state absent express federal law to the contrary. (*People v. McCovey*, Supra 198.) The motions to dismiss are therefore denied.

Each of the defendants joined the challenge to the record under the provisions of P.C. 995 as to each of them, individually, and the Court having reviewed the record as to each defendant denies each of the motions.

The case is to be calendared for September 16, 1983 at 9:15 a.m. for setting.

DATED: August 26, 1983.

CHARLES M. THOMAS, JR.
Charles M. Thomas, Jr.
Judge of the Superior Court, Assigned

Appendix D

ORDER DENYING REHEARING

No. S002805

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

IN BANK

Mattz et al., Petitioners

v.

The Superior Court of the County of Del Norte, Respondent;
People, Real Party in Interest

[Filed October 13, 1988]

Real Party in Interest's petition for rehearing DENIED.

Mosk, J. and Kaufman, J., are of the opinion the petition should be granted.

LUCAS
Chairman